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DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 18

RIN 1290-AA26

Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges

AGENCY: Office of the Secretary, Labor.

ACTION: Final rule.

SUMMARY: This is the final text of regulations governing practice and procedure for proceedings before the United States Department of Labor, Office of Administrative Law Judges (OALJ). The regulations were first published as a final rule in 1983 and were modeled on the Federal Rules of Civil Procedure (FRCP). A Notice of Proposed Rulemaking was published in the Federal Register on December 4, 2012 requesting public comment on proposed revisions to and reorganization of these regulations. The revisions make the regulations more accessible and useful to parties. The revisions also harmonize administrative hearing procedures with the current FRCP and with the types of claims now heard by OALJ, which increasingly involve whistleblower and other workplace retaliation claims, in addition to a longstanding caseload of occupational disease and injury claims. The Department received sixteen comments to the proposed

rule. This rule responds to those comments and establishes the final text of the revised regulations.

DATES: Effective date: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Compliance date: This rule is effective [INSERT DATE 30 DAYES AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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#### SUPPLEMENTARY INFORMATION:

##### I. BACKGROUND

On December 4, 2012, the Department published a Notice of Proposed Rulemaking (NPRM) with a request for comments amending 29 CFR part 18, subpart A. Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judge, 77 FR 72142 (Dec. 4, 2012). The Department proposed to amend comprehensively its procedural rules to reflect the changes to civil litigation since the OALJ promulgated its rules in 1983. Moreover, the need to update the OALJ's procedural rules was evident as the OALJ's authority to hear whistleblower cases increased. The new procedural rules are analogous to the FRCP used in the United States district courts and are intended to provide more guidance and clarity to parties practicing before the OALJ.

The Department provided an opportunity for the public to comment even though the changes are to rules of agency organization, procedure and practice, which are exempt from the notice and public comment requirements of the Administrative Procedure Act (APA). See 5 U.S.C. 553(b)(3)(A). The comment period ended on February 4, 2013. The Department reviewed and responded to each pertinent comment submitted. See infra Part 3. Accordingly, the NPRM amending 29 CFR part 18, subpart A, that was published on December 4, 2012, is being adopted as a final rule with the changes made below.

The Department has found that a handful of departmental specific program regulations reference these rules, and that these references may now be inaccurate due to shifts in numbering. The Department plans to correct these references in the near future through technical corrections, which will be published in the Federal Register.

## II. SUMMARY OF GENERAL COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

The Department received several general comments regarding the proposed changes to the OALJ rules of practice and procedure. Each comment is addressed as follows:

Compliance with the APA. The Department stated in the NPRM that while the proposed changes consist of amendments to rules of agency organization, procedure and practice that are exempt from the notice and public comment requirements of the APA, the Department wished to provide the public with an opportunity to comment on any aspect of the proposed rule. Accordingly, the proposed changes were published in the

Federal Register, and public comment was invited. Two commenters challenged the Department's reference to the APA's procedural rules exception and claimed that the Department thus misinformed the public and chilled the pool of public comment on the proposed rule changes. These commenters asserted that the public harm resulting from this alleged error could only be remedied by withdrawing the proposed rules and reissuing them in conformity with the full notice and comment protections of the APA. One commenter argued that because the rules contain provisions for sanctions, they "substantially alter the rights and interests of parties" which triggers the APA's requirements for public notice and comment. This comment principally relied on the vacated decision of the Court of Appeals for the District of Columbia in Air Transp. Ass'n of Am. v. Dep't of Transp., 900 F.2d 369 (1990), cert. granted, 498 U.S. 1023 (1991), vacated, 933 F.2d 1043 (1991). The other commenter stated that the OALJ rules of practice and procedure constitute agency rules with the "force and effect of law" that must be published for public comment in accordance with the Supreme Court's decisions in United States v. Mead Corp., 533 U.S. 218 (2001), and Christensen v. Harris Cnty., 529 U.S. 576 (2000).

The Department disagrees with these claims. In decisions issued subsequent to its vacated ruling in Air Transp. Ass'n of Am., the D.C. Circuit has stressed that the "critical feature" of a rule that satisfies the so-called "procedural exception" is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." James V. Hurson Assoc., Inc. v. Glickman, 229 F.3d 277, 280 (2000) (quoting JEM Broad Co. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994)). The

Court further held in Hurson that “an otherwise procedural rule does not become a substantive one, for notice and comment purposes, simply because it imposes a burden on regulated parties.” Id. at 281. As nothing in the new rules alters the “substantive criteria” by which claims and complaints are adjudicated in the hearing before the OALJ, they are within the procedural rules exemption. See id. at 280-81; JEM Broad Co., 22 F.3d at 237; Nat’l Whistleblower Ctr. v. Nuclear Regulatory Comm’n, 208 F.3d 256, 262 (D.C. Cir. 2000), cert. denied, 531 U.S. 1070 (2001). The Supreme Court’s decisions in Mead Corp. and Christensen cited by the other commenter respectively address whether a U.S. Customs Service classification ruling and Department of Labor opinion letter, neither of which were issued after APA notice and comment rulemaking, are entitled to deference under Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). These decisions do not address the scope of the APA’s procedural rules exception.

The Department moreover voluntarily published the rule changes in accordance with the notice and comment requirements of the APA consistent with the procedure recommended by the Administrative Conference of the United States to avoid controversy over the scope of the APA’s notice and comment exceptions. See The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, 1 CFR 305.92-1 (1995) (ACUS Recommendation 92-1, available at [www.acus.gov/sites/default/files/documents/92-1/pdf](http://www.acus.gov/sites/default/files/documents/92-1/pdf)). . The commenters provided no evidence to support their claim that the Department’s voluntary compliance with the APA’s notice and comment requirements in accordance with the ACUS recommendation in any manner chilled or otherwise influenced public comment. They

also cited no legal authority for their position that the Department's mere reference to the procedural rules exception vitiated the NPRM. The Department's receipt of multiple comments indicates that the public was neither "chilled" nor deterred from submitting items for consideration. Thus, there is no basis for withdrawing and reissuing the rules changes.

Conflicts with the LHWCA and BLBA. Two commenters argued that several provisions in the new rules providing for imposition of sanctions conflict with provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901-950, which are also applicable to claims adjudicated under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901-945, and therefore those provisions should either be deleted or rewritten to specifically state that they are not applicable to proceedings under the LHWCA and BLBA. The commenters identified sections 926, 927(b) and 931 of the LHWCA, 33 U.S.C. 926, 927(b), 931, as conflicting with the new rules containing sanction provisions. One commenter also suggested that some of the new rules may contravene section 923(a) of the LHWCA, 33 U.S.C. 923(a). The Department believes however that any conflicts between the rules and the LHWCA and, for that matter, any other statute governing administrative hearing proceedings before the OALJ, are already addressed appropriately in the rules and do not warrant either wholesale rescission or rewriting. The Department also believes that the commenters overstated the alleged conflicts between the new rules and the LHWCA.

Section 923(a) of the LHWCA provides that officials conducting hearings "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation

or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.” 33 U.S.C. 923(a). See also 20 CFR 702.339, 725.455(b). The Benefits Review Board (BRB) and courts of appeals have nevertheless applied provisions of the OALJ Rules of Practice and Procedure, particularly in regard to discovery issues, in proceedings governed by section 923(a) of the LHWCA in the absence of any conflict with a particular LHWCA or BLBA rule. See, e.g., Johnson v. Royal Coal Co., 326 F.3d 421, 426 (4th Cir. 2003); Keener v. Peerless Eagle Coal Co., 23 Black Lung Rep. (Juris) 1-229, 1-243 (Ben. Rev. Bd. 2007) (en banc); Cline v. Westmoreland Coal Co., 21 Black Lung Rep. (Juris) 1-69, 1-76 (Ben. Rev. Bd. 1997); see also Prince v. Island Creek Coal Co., BRB No. 01-0448 BLA, 2002 WL 34707263 (Ben. Rev. Bd. Jan. 24, 2002) (reading 29 CFR 18.14 and 20 CFR 725.455 as complementary rules providing the ALJ with broad discretion to direct discovery), aff’d, 76 Fed.Appx. 67, 2003 WL 22176988 (6th Cir. Sept. 19, 2003). It would be inappropriate and contrary to well-established precedent to add a textual exception to all of the proposed disclosure and discovery rules for LHWCA and BLBA cases. Moreover, §18.10(a) provides that “[t]o the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls.” 29 CFR 18.10(a).

Section 926 of the LHWCA provides that “[i]f the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.” 33 U.S.C. 926. Congress intended claimants to be subject to costs “if they brought their unreasonable claims into court”

when it enacted section 926. Metro. Stevedore Co. v. Brickner, 11 F.3d 887, 890 (9th Cir. 1993). The Department recognizes that federal courts have the exclusive power to impose section 926 sanctions when a party brings a frivolous claim under the LHWCA. Id. at 890-91; see also Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 1004 (5th Cir. 1995). However, to the extent that any of the new rules conflict with section 926, the latter controls. See 29 CFR 18.10(a). There is therefore no conflict between section 926 and any of the new rules.

Section 927(b) in relevant part provides that if any person in a LHWCA proceeding “disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law,” the adjudicatory official “shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia” for summary contempt proceedings). 33 U.S.C. 927(b). The Department agrees with the commenters that section 927(b) provides the district courts with the exclusive power to punish contumacious conduct consisting of a refusal to comply with a judge’s order, lawful process or subpoena, or hearing room misbehavior in proceedings under the LHWCA. See Goicochea v. Wards Cove Packing Co., 37 Ben. Rev. Bd. Serv. (MB) 4, 6 (2003) (vacating dismissal of claim as sanction for claimant’s refusal to comply with a judge’s discovery order). To the extent that any of the new rules conflict with section 927(b), the latter controls. See 29 CFR 18.10(a). However, there are several



situations addressed by the new rules involving conduct that likely would fall outside the categories of contumacy requiring certification to a district court for a section 927(b) summary contempt proceeding. See A-Z Intn'l v. Phillips, 323 F.3d 1141, 1146-47 (9th Cir. 2003) (holding that the district court lacked section 927(b) jurisdiction over conduct that did not involve a refusal “to comply with a summons, writ, warrant, or mandate issued by the ALJ”). See, e.g., 29 CFR 18.35(c) (sanctions for violations of §18.35(b) relating to the representations made when presenting a motion or other paper to the judge), 18.50(d)(3) (sanctions for violations of §18.50(d)(1) pertaining to certifications made when signing disclosures and discovery requests, responses and objections), 18.56(d)(1) (sanctions for violations of the duty under §18.56(c)(1) to protect a person subject to a subpoena from undue burden), 18.57(c) (sanctions for failures to disclose information, supplement an earlier response or to admit as required by §§18.50(c), 18.53 and 18.63(a)), 18.57(d) (sanctions for a party’s failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection), 18.64(d)(2) (sanctions for impeding, delaying or frustrating a deposition), 18.64(g) (sanctions for failing to attend or proceed with a deposition or serve a subpoena on a non-party deponent when another party, expecting the deposition to be taken, attends), 18.72(h) (sanctions for submitting in bad faith an affidavit or declaration in support of or in opposition to a motion for summary decision). To the extent these provisions address violations of the procedural rules falling outside the scope of section 927(b), there is no conflict with the statute.

The Department also rejects the commenters’ argument that section 927(b) provides the exclusive remedy for any misconduct or rules violation occurring in

LHWCA and BLBA proceedings. Section 927(b), 44 Stat. 1438 (Mar. 4, 1927) (codified as amended at 33 U.S.C. 927), was originally enacted in 1927, decades before the passage of the APA which also governs adjudications under the LHWCA and the BLBA. 33 U.S.C. 919(d); 30 U.S.C. 932(a); Dir., OWCP, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 280-81 (1994); see also Lane v. Hollow Coal Co. v. Dir., OWCP, Dep't of Labor, 137 F.3d 799, 802-03 (4th Cir. 1998) (requiring ALJ's decision to contain findings and conclusions, in accordance with 5 U.S.C. 557(c)(3)(A)); Cole v. East Kentucky Collieries, 20 Black Lung Rep. (Juris) 1-50, 1-54 (Ben. Rev. Bd. 1996) (discussing statutory mechanism whereby APA applies to BLBA claims); Toyer v. Bethlehem Steel Corp., 28 Ben. Rev. Bd. Serv. (MB) 347, 351 (1994) (emphasizing APA applicability in all LHWCA adjudications). Notably, the APA's grant of authority to "regulate the course of the hearing," 5 U.S.C. 556(c)(5), provides a judge with an independent basis to take such actions as are necessary to ensure parties a fair and impartial adjudication. Such authority includes the power to compel discovery and impose sanctions for non-compliance pursuant to the OALJ rules of practice and procedure. See Williams v. Consolidation Coal Co., BRB No. 04-0756 BLA, 2005 WL 6748152, at \*8 (Ben. Rev. Bd. Aug. 8, 2005), appeal denied, 453 F.3d 609 (4th Cir. 2006), cert. denied, 549 U.S. 1278 (2007). The bifurcation of general adjudicatory authority and contempt powers between administrative law judges and the district courts under the LHWCA is analogous to adjudication in the federal courts after passage of the Federal Magistrates Act, 28 U.S.C. 604, 631-39, under which magistrate judges have general authority to order non-dispositive discovery sanctions while contempt charges must be referred to a district court judge. See Grimes v. City and County of San

Francisco, 951 F. 2d 236, 240-41 (9th Cir. 1991) (discussing the scope and limits of magistrate judges' sanction authority); see also Dodd v. Crown Cent. Petroleum Corp., 36 Ben. Rev. Bd. Serv. (MB) 85, 89 n.6 (2002) (affirming, as not inconsistent with section 927(b), judge's imposition of sanctions pursuant to 29 CFR 18.6(d)(2) for claimant's noncompliance with a discovery order). The Department therefore believes that the commenters' proposal to exempt LHWCA and BLBA proceedings from the judge's authority under the APA to regulate the course of the hearing is neither warranted by the statute nor consistent with the efficient and impartial conduct of administrative hearings.

Section 931(a)(1) of the LHWCA provides that "[a]ny claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this chapter shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed \$10,000, by imprisonment not to exceed five years, or by both." 33 U.S.C. 931(a)(1). Section 931(c) similarly provides that "[a] person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents pursuant to section 909 of this title if the injury results in death, shall be punished by a fine not to exceed \$10,000, by imprisonment not to exceed five years, or by both." 33 U.S.C. 931(c). As there is no provision in the new rules that authorizes a judge to impose a fine or other penalty for a knowing and willfully false statement or representation for the purpose of obtaining or opposing a benefit under the LHWCA, there is no conflict between section 931 and any of the new rules.

Authority to Regulate the Conduct of Administrative Proceedings; Sanctions.

The Department announced in the NPRM that it intended to bring the OALJ rules of practice and procedure into closer alignment with the FRCP. Doing so takes advantage of the mature precedent the federal courts have developed and the broad experience they have in applying the FRCP. Choosing which portions to adopt and which to omit allows for flexible case management, given the less formal nature of administrative proceedings, which never involve juries. These changes offer greater clarity and uniformity so parties can focus on the merits of their disputes with less distraction from litigating points of procedure. To attain these objectives, the new rules contain a number of provisions, similar to their FRCP counterparts, which authorize judges to take actions necessary to regulate and ensure the integrity of the hearing process. See 29 CFR 18.12(b)(10), 18.35(c), 18.50(d)(3), 18.56(c)(1), 18.57(a)(2)(A), 18.57(b), 18.57(c), 18.57(d)(1), 18.57(d)(3), 18.57(e), 18.57(f), 18.64(d)(2), 18.64(g), 18.72(h), 18.87. Two commenters asserted that these litigation sanction provisions exceed a judge's authority under the APA, and attempt to arrogate contempt power and claim "inherent judicial authority" that is vested exclusively in the Article III courts. The Department believes these assertions misunderstand the challenged rules and their intent.

The prior rules authorized judges to sanction a broad range of inappropriate conduct during the course of an administrative proceeding. A judge could overrule an objection to a discovery request (such as request for admission or an interrogatory) and compel a response. 29 CFR 18.6(d)(1). If that objecting party thereafter failed to answer or answered evasively, the judge could order that a matter be treated as admitted. Id. If a party failed to comply with a subpoena, discovery order or any other order, the judge

could take other just actions, including (i) drawing adverse inferences; (ii) ruling that the matter concerning which the subpoena or order was issued be taken as established adversely to a non-complying party; (iii) excluding evidence a non-complying party offered; (iv) ruling that a non-complying party could not object to the use of secondary evidence to establish what evidence it withheld should have shown; or (v) ruling that all or part of a pleading be stricken, or that a decision be rendered against the non-complying party. 29 CFR 18.6(d)(2). The prior rules also recognized that judges have “all powers necessary to the conduct of fair and impartial hearings including, but not limited to . . . [w]here applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, issued from time to time and amended pursuant to 28 U.S.C. 2072 . . . .” 29 CFR 18.29(a)(8). The new rules preserve this longstanding authority to impose appropriate litigation sanctions, see 29 CFR 18.12(b)(10), 18.57(b), and additional provisions for sanctions were made as discussed above in §§18.35(c), 18.50(d)(3), 18.56(c)(1), 18.57(c), 18.57(d), 18.64(d)(2), 18.64(g), 18.72(h). The new rules provide greater clarity and direction on the scope and limitations on a judge’s authority to sanction a party’s unjustified failure to carry out duties that the procedural rules establish.

The Department’s appellate boards and judges have no Article III status or powers. See, e.g., Temp. Emp’t Serv. v. Trinity Marine Group, Inc., 261 F.3d 456, 460-61 (5th Cir. 2001); Schmit v. ITT Fed. Elec. Int’l, 986 F.2d 1103, 1109-10 (7th Cir. 1993); Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1117 (6th Cir. 1984). The APA vests no contempt powers in ALJs. The Department acknowledges that FRCP 11 itself does not vest ALJs with authority to impose the sanctions embodied in that rule because

it is a rule of the Article III trial courts. Nor was it clear whether FRCP 11 had been generally incorporated into the prior rules by 29 CFR 18.1(a). Metro. Stevedore Co. v. Brickner, 11 F.3d 887, 891 (9th Cir. 1993) (expressing in dicta doubts about incorporation). FRCP 11 was unavailable for incorporation in Longshore claims, however. Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997 (5th Cir. 1995) (Section 26 of the Longshore Act confines an award of costs when proceedings are “instituted or continued without reasonable grounds” to proceedings that have made their way into the Article III courts. Therefore, neither FRCP 11 nor section 26(f) may be incorporated into Longshore Act proceedings at the Department through the text of 29 CFR 18.1(a) on the theory that the “situation [is] not provided for or controlled by statute.”); Metro. Stevedore Co., 11 F.3d at 891 (finding that under section 26 of the Longshore Act only courts can assess costs against a claimant who institutes or continues a proceeding in the courts without reasonable grounds); R.S. [Simons] v. Va. Int’l Terminals, 42 Ben. Rev. Bd. Serv. (MB) 11, 14 (2008) (rejecting an argument that an ALJ could assess attorney’s fees against an employer that were unavailable under section 28 of the Longshore Act by using FRCP 11 instead); Valdez v. Crosby & Overton, 34 Ben. Rev. Bd. Serv. (MB) 69, 77 (2000) (applying the holdings in Boland Marine & Mfg. Co. and Metro. Stevedore Co.); Crum v. Wolf Creek Collieries, 18 Black Lung Rep. (Juris) 1-80, 1-83 (Ben. Rev. Bd. 1994). Though the new rules use the term “sanction” to describe remedies that can be applied when a party fails to fulfill its duties, these remedies do not extend to the full panoply of powers available to Article III judges under their inherent powers or under FRCP 11, which encompass the authority to require an errant lawyer to participate in

seminars or education programs, or order a fine payable to the court. See FED. R. CIV. P. 11 advisory committee's note(discussion of 1993 amendments).

Nonetheless, the APA empowers ALJs, “[s]ubject to published rules of the agency and within its powers . . . to regulate the course of a hearing.” 5 U.S.C. 556(a)(3), (c)(5). That authority is statutorily explicit. The appellate courts moreover have upheld orders that impose litigation sanctions on parties who violate an administrative agency’s procedural rules. See Roadway Exp., Inc. v. U.S. Dept. of Labor, 495 F.3d 477, 484 (7th Cir. 2007) (“[A]gency’s rules unambiguously permit the ALJ to impose, as a discovery sanction, an order excluding evidence that a non-complying party wishes to introduce in support of its claim.”); In re Bogese, 303 F.3d 1362, 1367-68 (Fed. Cir. 2002) (Patent and Trademark Office, like other administrative agencies, may impose reasonable deadlines and requirements on parties appearing before it and has broad authority to sanction undue delay by holding a patent unenforceable); Atlantic Richfield Co. v. U.S. Dep’t of Energy, 769 F.2d 771, 793 (D.C. Cir. 1984) (rejecting argument that administrative agency “cannot impose evidentiary sanctions—of course, short of a fine or imprisonment—when necessary to preserve the integrity of an authorized adjudicative proceeding”). As the court of appeals in Atlantic Richfield Co. stated,

It seems to us incongruous to grant an agency authority to adjudicate—which involves vitally the power to find the material facts—and yet deny authority to assure the soundness of the fact finding process. Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and often times has every incentive to refuse to comply.

769 F.2d at 796. The adjudicatory duties of an ALJ are in many ways “functionally comparable” to those of a federal district court judge. Butz v. Economou, 438 U.S. 478, 513-14 (1978). It would be incongruous to deprive an ALJ of any procedural tools that

assure the integrity and soundness of the adjudicative process. The tools include the authority to impose litigation sanctions that do not conflict with the substantive statute applicable to the proceeding for procedural violations that frustrate efficient administrative adjudication. The Department's ALJs used a broad range of sanctions for the nearly 30 years under the prior rules, including the dismissal of a claim or defense, as well as lesser evidentiary sanctions. Curley v. Grand Rapids Iron & Metal Co., ARB No. 00-013, ALJ No. 1999-STA-39 (ARB Feb. 9, 1999) (affirming ALJ's authority to dismiss employment protection claim for abandonment, based on complainant's failure to participate in prehearing conference or reply to order to show cause why the matter should not be dismissed for failure to comply with a lawful order); see also Dodd v. Crown Cent. Petroleum Corp., BRB No. 02-0821, slip op. at 9-10 (Ben. Rev. Bd. Aug. 7, 2003) (affirming the dismissal for abandonment of a pro se litigant's claim under the authority of 29 CFR 18.29(a), which affords ALJs "all necessary powers to conduct fair and impartial hearings and to take any appropriate action authorized by the Federal Rules of Civil Procedure," where claimant failed to attend the final hearing, stated he would not participate, sustained objections to discovery the claimant sought, and denied the claimant's motion to recuse the ALJ); Matthews v. LaBarge, Inc., ARB No. 08-038, ALJ No. 2007-SOX-56 (ARB Nov. 26, 2008) (adopting ALJ's decision to dismiss under 29 CFR 18.6(d)(2) because ALJ found that pro se complainant failed to comply with discovery orders repeatedly, willfully, intentionally, and in bad faith); Administrator v. Global Horizons Manpower, Inc., ARB No. 09-016, ALJ No. 2008-TAE-3 (ARB Dec. 21, 2010) (affirming ALJ's order granting, as a discovery sanction under 29 CFR 18.6(d)(2)(v) and 18.29(a)(8), all the back pay and civil penalties the Administrator of the



Wage and Hour Division had sought against employer for “willful, contumacious disregard of the discovery process as well as disregard of the ALJ's multiple warnings and orders”); Administrator v. Global Horizons, Inc., ARB No. 11-058, ALJ No. 2005-TAE-1 & 2005-TLC-6, 2013 WL 2450031, at \*4-8 (DOL Admin. Rev. Bd. May 31, 2013) (affirming an ALJ's summary judgment awarding worker's back pay, repayment of impermissible deductions from pay, and awarding the Administrator civil penalties, which were based in large part on 145 factual allegations deemed admitted as the result of three orders that imposed sanctions for misconduct in discovery). But see Goichochea v. Wards Cove Packing Co., 37 Ben. Rev. Bd. Serv. (MB) 4, 7 (2003) (holding that in a claim for Longshore disability compensation benefits, the remedy for disobeying an order compelling discovery is the procedure described in section 27(b) of the Longshore Act).

The Department kept in mind the limits on the authority of an administrative agency to impose sanctions when it fashioned the litigation sanction provisions. Section 558(b) of the APA, cited by some commenters, states that “[a] sanction may not be imposed or a substantive rule or order issued except within the jurisdiction delegated to the agency and authorized by law.” 5 U.S.C. 558(b); see also Am. Bus. Ass'n v. Slater, 231 F.3d 1, 7 (D.C. Cir. 2000) (holding that the Department of Transportation lacked statutory authority to require a bus company to pay monetary damages to disabled passengers they failed to accommodate); Windhauser v. Trane, ARB No. 05-127, OALJ No. 2005-SOX-17, 2007 WL 7139497, at \*2-3 (DOL Admin. Rev. Bd. Oct 31, 2007) (reversing ALJs imposition of monetary sanctions against whistleblower complainant because such sanctions “are, by statute, in the jurisdiction of the federal district courts”). The Slater court distinguished between sanctions that require express statutory authority

under section 558(d) of the APA because they are directed at modifying “primary conduct,” such as a bus company’s failure to accommodate disabled passengers, and litigation sanctions designed to protect the integrity of the agency’s administrative processes. Id. The Slater court recognized an agency has “a limited power to impose sanctions that are not expressly authorized by statute, but only ones designed to ‘protect the integrity of its own processes.’” Id. (quoting Touche Ross & Co. v. SEC, 609 F.2d 570, 582 (2d Cir. 1979)); see also Davy v. SEC, 792 F.2d 1418, 1421 (9th Cir. 1986). The provisions for the limited sanctions in the new rules are not directed to any party’s primary conduct—which would be the subject matter of the proceeding—but to violations of procedural rules that compromise the integrity of the administrative hearing process. These litigation sanctions are consistent with the Department’s regulatory authority under section 556(c)(5) of the APA, do not require additional express statutory authorization under section 558(b) of the APA, and do not amount to an exercise of Article III courts’ contempt or sanction powers.

Remedial Purpose of Whistleblower Adjudications. The Department received a comment regarding whistleblower adjudications generally, which suggested that the procedural rules should reflect the remedial purpose of the whistleblower statutes under the OALJ’s jurisdiction. The Department notes that the new rules are procedural rules intended to apply to all proceedings before OALJ and not any specific class of proceeding. To the extent a particular agency seeks the application of specific procedural rules, it is incumbent on that agency to incorporate such rules into its own regulations. For instance, proceedings under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132, define specific procedures at 29 CFR 2570, subpart C.

The Department received a similar comment suggesting that the OALJ “should strive for better whistleblower protection than U.S. District Courts” because the OALJ has garnered specialized knowledge and the process is less formal in an agency adjudication. The comment however did not offer any concrete proposal for changes to the text of the new rules. Any program-specific change moreover should be addressed to the particular agency charged with administering the particular program.

Effect on Pro Se Litigants. One commenter asserted that the new rules will make litigation of whistleblower claims harder on pro se parties. The commenter noted that, although the OALJ rules of practice and procedure are analogous to the FRCP, there are some differences: for example, whistleblowers do not ordinarily have to plead a claim through a complaint. The commenter remarked that the Administrative Review Board (ARB) and other appellate authorities have construed pro se complainants’ positions liberally and with a degree of judicial latitude. The commenter also suggested that the Department’s comments should make clear that decisions on the merits are the goal, and compliance with procedural rules should “bend where necessary to meet that goal.”

The Department agrees that concerns relating to the ability of pro se litigants to submit and litigate complaints deserve consideration. As the ARB has enunciated, a pro se litigant’s presumed lack of familiarity with litigation procedures may require accommodation. For example, a pro se litigant must be informed of the consequences of failing to respond to dispositive motions, Motarjemi v. Metro. Council, Metro. Transit Div., ARB No. 08-135, ALJ No. 2008-NTS-2 (ARB Sept. 17, 2010), and an untimely filing may be considered, Wallum v. Bell Helicopter Textron, Inc., ARB No. 12-110, ALJ No. 2009-AIR-20 (Sept. 19, 2012). The new rules provide uniform procedures for

case management, but simultaneously permit judges the flexibility to tailor procedures to specific cases through appropriate orders. So, for example, where a pro se complainant requires additional guidance, under the new rule the judge may issue more focused or detailed orders, as necessary. The new rules provide more detailed procedural information (particularly regarding discovery and other pre-hearing requirements) than had been the case previously. The Department therefore declines to adopt the commenter's suggestion.

Discovery Rules Regarding Electronically Stored Information. One commenter voiced some general concerns that the rules should clarify issues related to discovery of electronically stored information (ESI), specifically providing that both sides have access to discovery of ESI and that ESI is treated the same as paper documents. The Department believes those concerns are adequately addressed in §18.61, which states that there is no differentiation in the access to ESI or paper discovery. Thus, the rule provides the ALJ with the ability to manage discovery and minimize gamesmanship in discovery of both paper documents and ESI.

Electronic Filing. One commenter urged that the OALJ adopt and implement electronic case filing (ECF) or, in the alternative, allow facsimile filing and remove the maximum page limitation on faxes. Those concerns were also specifically raised in the comments to proposed §18.30 and are fully addressed in that response. However, the general answer is that the implementation of ECF is a resource constrained policy decision. Until the Department implements ECF, promulgating rules about ECF would lead to confusion.

Offer of Judgment. One commenter suggested that the OALJ's rules should include one analogous to FRCP 68, Offer of Judgment, and should expressly cut off attorney's fees and other litigation costs when a claimant refuses an offer and fails to obtain a more favorable result.

The Department declines to adopt the commenter's suggestion. An offer of judgment is significant matter that could affect an otherwise successful complainant's right to recover attorneys' fees as costs. Marek v. Chesny, 473 U.S. 1 (1985). No analog to FRCP 68 appears in the OALJ's previous rules. The Department stated its intention to align its procedural rules more closely with the FRCP, but did not give any notice that an offer of judgment rule was contemplated. The Department believes the final rule should not include an offer of judgment provision for three interrelated reasons.

First, doing so would not have given interested parties sufficient notice that such a rule was contemplated, and it is unclear that doing so now could be regarded a logical outgrowth of the rules proposed. See 5 U.S.C. 553(b)(3); Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 461 (D.C. Cir. 2012). Second, the OALJ issues no judgments; it is not a court, although it shares many attributes with Article III federal courts. FRCP 68 would have to be substantially altered to adapt to the context of administrative adjudication, as there is no clerk who could enter a judgment in the way FRCP 68(a) contemplates ("The clerk must then enter judgment."). Finally, FRCP 68 is subject to varying interpretations in the courts of appeals on how the defense should address attorney's fees in the text of an offer, when the substantive statute at issue directs the adjudicator to assess those fees as an item of costs. See CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3005.1 (3d ed. 2014). Any rule the

Department adopts should make a choice between the competing theories, to make the rule nationally uniform, and as useful to litigants as possible. Those choices will not be made without the benefit of public comment.

### III. SUMMARY OF SPECIFIC COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

The Department received several comments regarding specific sections in the NPRM. Each comment is addressed as follows:

§ 18.10 Scope and purpose. One commenter expressed concern that the principles expressed in section 923 of the LHWCA, providing that the LHWCA hearing process is not bound by formal rules of evidence but conducted in a manner to best ascertain the rights of the parties, may be circumvented by procedural rules not addressed in the LHWCA and BLBA and respective implementing regulations. The commenter suggested part 18 explains what sections do not apply to LHWCA or BLBA proceedings “to avoid confusion.” Another commenter suggested adding a paragraph “(d)” to §18.10, which would specifically state that in proceedings under the LHWCA and BLBA the following list of proposed rules would not apply: §§18.12, 18.23, 18.35, 18.50, 18.56, 18.57, 18.64, 18.70, 18.72, 18.80, and 18.87.

Future statutory and regulatory changes in the numerous administered programs, including the LHWCA, BLBA, employment discrimination, “whistleblower” and immigration cannot be foreseen. For instance, recent litigation has highlighted a BLBA-specific issue—one involving the disclosure of non-testifying expert opinions—that may deserve further consideration. See generally Fox v. Elk Run Coal Co., 739 F.3d 131 (4th

Cir. 2014). Nothing in these rules would prevent the Department from adopting a procedural rule that applies only in BLBA claim adjudications or other program-specific contexts. Moreover, listing variations in procedural requirements for the numerous programs in each new rule defeats the purpose of the new rules and would require constant rulemaking activity to reflect legislative changes. The Department thus disagrees with the submitted proposals to individually identify superseding statutory, regulatory or executive order provisions collectively in the new §18.10 or separately in those new rules where a conflict may exist.

One commenter suggested that the lack of an appeal process in regard to a judge's decision to modify, waive or suspend a procedural rule in new §18.10(c) "appears arbitrary and capricious." The Department disagrees. First, while the case is at the OALJ, no rule may be waived, modified or suspended without notice to the parties. Second, doing so requires the judge to make two determinations: that the specific alteration of the rule "will not prejudice a party," and "will serve the ends of justice." Finally, a party may raise before the appropriate appellate authority on direct review of the final order any error in modifying a rule.

§ 18.12 Proceedings before administrative law judge. The Department combined the designation provisions of prior §18.25 and the authority provisions of prior §18.29(a). The Department specifically clarified in the NPRM that the enumerated powers mirrored those set forth in section 556 of the APA and that the enforcement provision of prior §18.29(b) was deleted due to its contents of referring contumacious conduct to an appropriate federal court is set forth in applicable statutes, such as Section 927(b) of the LHWCA.

One commenter proposed that prior §18.29(b) should not be deleted “even though the content is contained in applicable statutes [because] this provision clearly delineates an administrative law judge’s restricted powers, especially under statutes like the LHWCA.” The Department disagrees with the comment that the provision on referring contumacious conduct to federal court should be retained in the new rules since controlling program statutes provide for such referral action when appropriate. See, e.g., 20 CFR 725.351(c).

The commenter also proposed deleting §18.12(b)(10) listing the authority of an ALJ to “take actions authorized by the FRCP” because the language would include all sanctions authorized by the FRCP and penalty sanctioning authority is reserved to the federal courts by the LHWCA and BLBA. Section 18.12(b)(10) was a succinct restatement of prior §18.29(a)(8). The Department agrees that the brevity in which prior §18.29(a)(8) was restated could be construed as excessively broad. To ensure consistency, the new §18.12(b)(10) is rewritten to closely align with prior §18.29(a)(8) by returning the words “where applicable” to the rule.

§ 18.22 Representatives. The Department narrowed the rule on representatives appearing before OALJ to reflect the two classes of representatives who routinely appear—attorneys and non-attorney representatives. The rule sets forth the qualifications required to appear as a representative of a party, the minimum duties required of a representative, and prohibited actions of any representative. One comment suggested that the proposed rule setting forth the qualifications for an attorney representative is overreaching and conflicts with 5 U.S.C. 500(b). That provision states in relevant part: “An individual who is a member in good standing of the bar of the highest court of a



State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.” Id. The commenter suggested nothing more should be required of an attorney representative seeking to represent a party before OALJ. The commenter believed that the proposed §18.22 (a)-(d) imposed additional requirements inconsistent with 5 U.S.C. 500(b).

The Department has made revisions to the new rule in response to this comment. The Department deleted the following sentence from §18.22(a): “The notice of appearance shall also include the statements and documentation required for admission to appear for the applicable category of representation found in subdivision (b) of this section.” The Department has added the following in its place: “Any attorney representative must include in the notice of appearance the license registration number(s) assigned to the attorney.” Essentially the only requirement that an attorney representative must follow in order to represent a party before the Department is to file a notice of appearance and include the appropriate attorney license registration number. Filing the notice of appearance by the attorney representative will constitute an attestation that: (a) the attorney is a member of a bar in good standing of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia; and (b) no disciplinary proceeding is pending against the attorney in any jurisdiction where the attorney is licensed to practice law. The Department has amended §18.22(b)(1)(i) to reflect this change.

The Department disagrees with the comment that sections (c) and (d) conflict with 5 U.S.C. 500. Section (c) sets forth the minimum requirements expected of any

representative during the course of a proceeding before the Department, and section (d) delineates prohibited actions of any representative appearing in a proceeding before the Department. Neither section prescribes any additional requirements for an attorney representative to appear on behalf of a party before the Department.

The Department set forth the minimum duties required of all representatives appearing before the OALJ in §18.22(c). These duties originate from the rules of conduct and standards of responsibility imposed by the Social Security Administration (SSA) on representatives appearing before the SSA. See 20 CFR 404.1740(b). While the Department realizes that the non-adversarial nature of SSA hearings may require more detailed procedures, the basic duties included in the new rule are elementary to any hearing process and serve as a baseline foundation for conducting hearings promptly, efficiently, and fairly. The new rule also states that an attorney representative must adhere to the rules of conduct applicable where the attorney is licensed to practice law. In setting forth this standard, the Department understands that hearings often occur outside of a jurisdiction where an attorney may be licensed to practice law, and imposing an unfamiliar standard of conduct on an attorney would not be ideal.

One comment suggested that paragraph (c) should be stricken because requiring attorneys to adhere to the rules of conduct in their licensing jurisdictions “could result in the different standards for the submission of evidence, discovery, and other substantive and procedural matters.” The Department disagrees. Rules of professional conduct are generally considered rules of reason and should be interpreted with reference to the law itself. Different rules of conduct should not apply based on specific substantive or procedural law. At a minimum, attorneys should always be held to the standards of

conduct where they are licensed to practice law. The Department declines to strike the paragraph.

The new rule also defines prohibited actions of all representatives appearing before the Department in paragraph (d). The prohibited actions include such things as: threatening, coercing or intimidating a party; knowingly making false or misleading statements; or causing unreasonable delay. These again derive from the SSA regulations. 20 CFR 404.1740(c). One comment suggested that the paragraph should be stricken because it adds confusion and may require attorneys to act contrary to the interests of their clients or the rules of conduct required by their licensing jurisdictions. The Department declines to strike the paragraph.

§ 18.23 Disqualification and discipline of representatives. The proposed rule contemplated two paths for disqualification and disciplinary proceedings of attorney representatives appearing before the OALJ. One path regulated lawyers who were authorized to practice before the Department through admission to the bar of the highest court of a state or similar governmental unit, but lost the right to practice law in their licensing jurisdiction because of a criminal conviction or proven professional misconduct. The second path involved misconduct of a representative before the OALJ. One comment questioned the Department's authority to initiate disciplinary proceedings at all. The NPRM spells out the Department's authority to discipline attorneys in great detail and need not be restated herein. The Supreme Court has recognized such authority as early as 1923 in a case involving the Board of Tax Appeals where it upheld the Board's power to adopt rules of practice for professionals to protect the integrity of its administrative procedures and the public generally. See Goldsmith v. United States Bd.

of Tax Appeals, 270 U.S. 117 (1926). Other comments suggested that the wording of the rule was not clear and suggested that as drafted, it appeared that the OALJ would be making the initial determination as to whether an attorney had committed any enumerated criminal act or professional misconduct.

The Department considered the comments and has amended the rule by consolidating the grounds upon which an attorney or representative may be disqualified or disciplined into one section—new §18.23(a)(1). New §18.23(a)(1) now sets forth three distinct grounds for disqualification: (1) suspension of a license to practice law by any court or agency of the United States, or by the highest court of a State or similar governmental unit; (2) disbarment from the practice of law by consent or resignation from the bar of a court or agency while an investigation into allegations of misconduct is pending; or (3) committing an act, omission, or contumacious conduct that violates the procedural rules, an applicable statute, an applicable regulation, or a judge’s order(s). Accordingly, the previous sections providing for disqualification upon conviction of a felony (proposed §18.23(a)(1)(i)) or certain enumerated misdemeanors (proposed §18.23(a)(1)(ii)) are removed from the new rule. Such conduct however may still be grounds for disqualification in the new rules to the extent that new §18.23(a)(1)(i) through (iii) apply.

The Department also consolidated the disqualification and discipline procedure into one section—new §18.23(a)(2). The new consolidated “Disqualification procedure” states that in all instances the Chief Judge provides notice and an opportunity to be heard prior to taking any action. The provision deletes language pertaining to requests for

hearing but also recognizes that, in appropriate instances, additional proceedings may be necessary, within the Chief Judge's discretion.

Other comments questioned the timeline for disciplinary proceedings and the status of cases while disciplinary proceedings are pending against an attorney. The Department notes that the new rule contemplates a fast track with an initial response time of 21 days. The Department believes that the Chief Judge should have the discretion to decide whether an attorney can continue to represent a party before the Department during the pendency of any disciplinary proceeding on a case-by-case basis.

Two commenters suggested that the Department maintain a national database of non-attorney representatives disciplined by the Department. The Department declines to amend the part 18 regulations to establish such a database because OALJ already publishes formal disciplinary decisions on its website in the same manner as other judge decisions. See, e.g., In the Matter of the Qualifications of Edwin H. Rivera, 2009-MIS-2 (ALJ Feb. 6, 2009) (denying non-attorney representative the authority to appear in a representative capacity before OALJ).

§ 18.24 Briefs from amicus curiae. The proposed rule sets forth the general procedure for accepting a brief from an amicus curiae. The Department received two comments suggesting that the deadline for an amicus brief is too short. The proposed rule required such briefs by the close of the hearing unless otherwise directed by the presiding judge. The comments pointed out that no transcript is immediately available when the hearing closes and it may be better for an amicus curiae to review the brief of the party the amicus supports to allow the amicus curiae to focus on new arguments. The Department considered the comments and agrees that setting the deadline at the close of

the hearing is impractical. The Department has amended the new rule by deleting any specific deadline for an amicus brief, and instead states that the deadline will be set by the presiding judge.

The Department has also received comments suggesting that it require amicus curiae to make disclosures similar to those found in U.S. Supreme Court Rule 37.4. Such disclosures include whether counsel for a party authored any part of an amicus brief and the identity of anyone who made monetary contributions to the preparation of the brief other than the amicus curiae or its members. The Department declines to adopt the specialized disclosure requirements. Any specialized requirement can be considered by the presiding judge and made part of a briefing order depending on the facts of any particular case.

§ 18.30 Service and filing. Commenters suggested that the list of documents not to be filed until used in the proceeding or ordered by a judge (§18.30(b)(1)) should be amended to add the notice and copy of “documents only” subpoenas that are required to be served on other parties by §18.56(b)(1). That suggested change is consistent with the purpose of both the prior and proposed rule and reflects current common practice. The new rule is thus changed to add paragraph (b)(1)(vi) with the following language: “the notice (and the related copy of the subpoena) that must be served on parties under rule 18.56(b)(1) before a ‘documents only’ subpoena may be served on the person commanded to produce the material.”

Several commenters argued that the OALJ’s rules do not adequately accommodate electronic filing and service, which is now commonplace in federal courts and adjudicatory agencies. Commenters urged that the OALJ adopt an electronic filing

system, or at least adopt a more liberal stance toward accepting email and facsimile transmissions.

The Department acknowledges that implementation of a dedicated electronic filing system and electronic service system for OALJ adjudications would be beneficial. However, because the OALJ does not have a dedicated electronic filing and service system, the rules of practice and procedure necessarily focus on traditional filing and service.

Several commenters urged that, in the absence of the availability of electronic filing, OALJ accept documents filed by email. The Department declines to adopt a regulation that permits filing by email for routine filings with the OALJ. Email is not a substitute for a dedicated electronic filing system in which administrative issues such as document management, storage, security, and access can be systematically addressed. The proposed regulation at §18.30(b)(4) accommodates special circumstances by authorizing the judge to “allow papers to be filed, signed, or verified by electronic means.”

Alternatively, several commenters urged that the OALJ accept documents filed by facsimile transmission without a page limitation. The Department declines to adopt a regulation that permits filing by facsimile for routine filings with the OALJ. Facsimile technology is not a substitute for traditional mail or hand delivery of filings or for a dedicated electronic filing system. When §18.3 of the prior rules was amended in 1994 to permit filing by facsimile in certain circumstances, the Department discussed why, although the use of facsimile machines is often convenient to parties, it is not administratively practical for routine matters. See Amendment of Filing and Service

Requirements in Proceedings Before the Office of Administrative Law Judges, 59 FR 41874 (Aug. 15, 1994). Although information technology has advanced considerably since 1994, it is still true that most filings before the OALJ are not time sensitive and that the Department is not in a position to bear the cost of receiving and printing large numbers of facsimile transmissions. The new rule at §18.30(b)(3)(i) accommodates special circumstances by allowing a party to file by facsimile if permitted by the judge.

One commenter stated a concern that a judge could reject a facsimile filing that exceeded 12 pages. The 12 page limitation stated in §18.30(b)(3)(i)(A) is confined to situations in which the party is unable to obtain prior permission to file by facsimile because the judge is unavailable. The 12 page limitation is a sensible limitation to discourage reliance on last hour filings by facsimile. Thus, the Department declines to revise §18.30(b)(3)(i)(A) to remove the 12 page limitation on facsimile filings made without the judge's permission.

One commenter suggested that the OALJ's rules of practice and procedure provide for electronic service between parties, stating that if a representative wishes to receive all service by email, that individual should be able to so state in the record and then receive all subsequent service by email. Section 18.30(a)(2)(ii)(E) already accommodates this suggestion. That regulation states that "[a] paper is served under this section by . . . sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served . . . ."

One commenter stated that the rule, as written, creates a paradox that a time sensitive filing could be filed with the OALJ by facsimile, but served by mail on the



opposing party. This commenter suggested that adopting a service requirement that allows for email service would resolve this problem. As noted above, the regulation permits parties to agree to receipt of service of papers by electronic means. The Department declines to revise the rule to require electronic service on another party in situations where the filing party was granted permission to file a paper with the OALJ electronically.

§ 18.31 Privacy protection for filings and exhibits. One commenter suggested that the privacy requirement should be inapplicable to any document created prior to the effective date of the final rule in BLBA cases. The commenter stated that medical records containing social security numbers and other protected information are created long before a claim is filed and it would be burdensome to redact this information.

The FRCP Advisory Committee noted in its comments to FRCP 5.2 that “[i]t is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.” Fed. R. Civ. P. 5.2 advisory committee’s note (discussion of 2007 amendments). The FRCP focuses on electronic records, but applies the same restrictions to hard-copy documentation, reasoning that the number of paper filings will diminish over time.

The Department declines to adopt the commenter’s suggestion. The privacy interests of individuals whose personal records appear before the OALJ outweigh the burden placed on those who represent them. Many of these records can be scanned and searched for the sensitive information, reducing the time and effort required to complete this redaction. The commenter’s suggestion that this rule apply only to records created after the effective date of the final rule would severely limit its utility. The parties may

choose to waive the protection of the rule if it would be unduly burdensome to redact the records, or the parties may petition the judge for a waiver of the rule.

§ 18.32 Computing and extending time. Commenters noted that setting 4:30 P.M. as the default deadline for filing on a specific date is inconsistent with other rules of practice and sets a trap for the unwary practitioner who may reasonably expect that the deadline would be 11:59 P.M. They suggested changing the time to 11:59 P.M.

The FRCP allows for electronic filing up to 11:59 P.M., but still sets the close of local business hours as the deadline for hardcopy delivery. The commenters' suggestions primarily relate to online and facsimile filing. The OALJ continues to rely on hardcopy delivery as the default authorized means of filing and allows electronic or facsimile filing only as authorized by order or regulation. Since both e-filing and facsimile filing include time stamps that show exactly when a document arrived at the facsimile machine or server of the recipient, the office need not be open to determine when a document arrives. Since e-filing or facsimile filing is only allowed with the permission of the judge, counsel can request extended filing hours when they request permission to file in that manner. The Department therefore declines to adopt the suggestion.

Commenters also observed that the language at (a)(4) including as a legal holiday any other day declared a holiday by the President or Congress is overly broad and should be amended to include in the definition the provision that federal offices are closed to normal business. They suggested providing for extensions where a party is prevented from filing or requesting an extension by local circumstances, such as natural disasters or other events that require closure of government facilities.

FRCP 6(a)(3) addresses the problem by including a provision for the inaccessibility of the clerk's office. The new rules allow for judges to grant ex post facto delays in such cases. However, changing the term "legal holiday" to include any day on which the district office in which the document is to be filed is closed or otherwise inaccessible to the filing party would provide a clearer standard and avoid uncertainty over whether an ex post facto delay may be granted. The new rule is thus changed as follows:

(4) "Legal holiday" defined. "Legal holiday" means the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day, any day declared a holiday by the President or Congress, and any day on which the office in which the document is to be filed is closed or otherwise inaccessible.

§ 18.35 Signing motions and other papers; representations to the judge; sanctions.

New §18.35 is modeled after FRCP 11. It states the standards attorneys and parties must meet when filing motions or other documents with OALJ and provides sanctioning authority for violations of this section.

Several commenters pointed out that the LHWCA and BLBA contain specific statutory provisions dealing with resistance to an order, misconduct during hearings, and discovery violations. They suggest amending §18.35(c) to state that the sanctions provisions are not applicable to LHWCA and BLBA cases. The Department declines to adopt the commenters' suggestion for the reasons detailed above in section II, "Conflicts with the LHWCA and BLBA."

Several commenters objected to §18.35(c) in its entirety, suggesting that the section is essentially an attempt by the OALJ to exercise contempt power, which is limited to courts and may not be conferred upon administrative agencies. Section 18.35(c) however is not identical to FRCP 11(c)(4) and does not seek to invest OALJ judges with powers beyond the APA's grant of authority to impose appropriate sanctions where necessary to regulate and ensure the integrity of the hearing process. Thus, for the reasons detailed above in section II, "Authority to Regulate the Conduct of Administrative Proceedings; Sanctions," the Department declines to delete §18.35(c).

One commenter argued that there is no authority to hold a law firm jointly responsible for a violation committed by its partner, associate, or employee and failing to further define the circumstance that would justify an exception. The provision for law firm joint responsibility in §18.35(c)(1) is taken directly from the corresponding federal rule, which was revised in 1993 after the U.S. Supreme Court ruled that the previous language could not be interpreted to include a named offender's firm. Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120 (1989). Thus, the provision is in accord with federal practice and the Department declines to strike or modify the provision in §18.35(c)(1) concerning law firm joint responsibility.

One commenter observed that §18.35(c)(4) provides no guidance as to what type of sanction "suffices to deter repetition of the conduct or comparable conduct." The Department agrees that §18.35(c)(4) should be amended to provide more specific guidance. Paragraph (c)(4) of the rule is revised, containing the following language: "A sanction imposed under this section may include, but is not limited to, striking part or all of the offending document, forbidding the filing of any further documents, excluding

related evidence, admonishment, referral of counsel misconduct to the appropriate licensing authority, and including the sanctioned activity in assessing the quality of representation when determining an appropriate hourly rate and billable hours when adjudicating attorney fees.”

§ 18.50 General provisions governing disclosure and discovery. Under the new rule, a party may seek discovery at any time after a judge issues an initial notice or order and, unless the judge on motion orders otherwise, the methods of discovery may be used in any sequence regardless of the discovery conducted by other parties. The parties’ required initial disclosures would be made within 21 days after entry of an initial notice or order acknowledging that the case has been docketed for adjudication, and the rule includes a provision exempting certain proceedings and parties from the initial disclosure requirements. The Department received two comments focusing on the timing of disclosures and discovery in LHWCA and BLBA cases. One commenter urged that discovery should be available following transfer of the case to the OALJ or at any time upon stipulation of the parties, asserting that initial notices and orders have historically taken three months to issue and that discovery during this period of time will be unavailable under the new rule, resulting in unnecessary delay. This commenter also suggested that the timing for initial disclosures be set at 35 days following transfer of the case to the OALJ. Citing similar concerns about delay, the other commenter suggested that discovery should be available at any time after a claim is filed.

The Department disagrees with these proposals. The use of a judge’s initial notice or order as the case event allowing parties to commence discovery promotes uniformity and predictability as it is the first reliable indication to the parties that the case

is actually before the OALJ. The Department believes that use of the date of transfer from the District Director, Office of Workers' Compensation Programs is potentially confusing because this procedure is only applicable in LHWCA and BLBA cases. See 20 CFR 702.317, 725.421. The transfer or referral is an internal administrative function that lacks the clarity of the initial notice of order from the judge in terms of informing parties that a case has been docketed for adjudication. The Department further believes that allowing discovery at any time after a claim is filed is problematic as this would inevitably lead to development of discovery disputes before the case is assigned to a judge. While the Department is sensitive to the expressed concern regarding delays in the issuance of an initial notice or order, this is a matter that is better addressed through internal policy directives rather than creation of a special rule of procedure or exception. Finally, the Department believes that the new disclosure and discovery rules, taken as a whole, provide parties with sufficient flexibility to ensure that all authorized and appropriate discovery will be available prior to adjudication.

One comment raised a concern with the sequence of discovery in LHWCA cases by asserting that the logical first step is for a claimant to produce a medical report followed by the deposition of the report's author. The commenter suggested that the new rule could allow a claimant to manipulate the discovery process by delaying production of a medical report which might result in a respondent having insufficient time to identify a rebuttal expert. To blunt this potential tactic, the commenter proposed that the rule require a claimant to produce a medical report and disclose any experts early in the process. The Department believes that this concern is adequately addressed in the provisions of the rule governing disclosure of experts, see 29 CFR 18.50(c)(2) and

through the judge's broad discretion to oversee disclosure and discovery in an impartial manner that affords all parties a full and fair opportunity to be heard. Moreover, adoption of this proposal would create a special rule, applicable only in benefit cases such as those arising under the LHWCA and BLBA, which is inconsistent with the Department's objective of promulgating a uniform set of procedural rules.

One comment proposes that pro se parties be included in the list of parties who are exempted from the required initial disclosures under paragraph (c)(1)(iii) unless an ALJ orders the party to provide disclosures. The Department rejects this proposal as inconsistent with the efficient, impartial and fair adjudication of cases. The FRCP provides no such exemption for pro se litigants aside from those persons in government custody. See FED. R. CIV. P. 26(a)(1)(B)(iii). Having a separate set of rules for unrepresented parties or requiring a judge to provide them with legal guidance is inappropriate. See Pik v. Credit Suisse AG, ARB No. 11-034, ALJ No. 2011-SOX-6 (ARB May 31, 2012) (citing Rays Lawn & Cleaning Sys., ARB No. 06-112, ALJ No. 2005-SCA-7 (ARB Aug. 29, 2008)); Olsen v. Triple A Mach. Shops, Inc., 25 Ben. Rev. Bd. Serv. (MB) 40, 46 n.4 (1991), aff'd mem. sub nom. Olsen v. Dir., OWCP, 996 F.2d 1226 (9th Cir. 1993).

Two comments expressed a concern that it is burdensome and/or irrelevant to require an expert witness's written report to list all other cases in which the witness testified as an expert during the previous four years and the amount he or she was paid. See General Provisions Governing Disclosure and Discovery, 77 FR 72159 (proposed Dec. 4, 2014) (proposed §18.50(c)(2)(ii)(E) and (F)). These commentators stated that parties are not likely to have this information. The Department disagrees. While the

parties themselves may not have such information, surely an expert witness would. Moreover, the rule allows for an exception to this requirement where stipulated or ordered by the judge. This exception could be invoked in those unusual cases where the required information might not be reasonably obtainable. These requirements track FRCP 26(a)(2)(B), and the Department is not persuaded by these comments that any deviation in the OALJ rules is justified.

Two commenters urged adoption of a rule that would require parties to provide ESI in a searchable electronic format rather than paper copies when the requested information is available in electronic form. The commentators cited federal case law in support, stating that parties have been required to provide ESI in electronic format when requested in that form. While acknowledging the cited precedent, the Department rejects the proposal for a rule mandating production of ESI in electronic format whenever requested in that form. First, such a rule may violate the principle recognized in the NPRM that discovery of ESI should be proportional to what is at stake in the litigation. 77 FR 72146 (citing FRCP 26(b)(2)(C)(iii)) (citing THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 (Jonathan M. Redgrave et al. ed., 2d ed. 2007) (“Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.”)). Second, the proposal would override paragraph (b)(3)(iii), which is based on FRCP 26(f)(3)(C) making any issues about disclosure or discovery of ESI, including the form or forms in which it should be produced, a required item in discovery plans.



This proposal also conflicts with §18.51(b)(2) which, like FRCP 26(b)(2)(B) upon which it is based, provides that ESI discovery issues are to be determined by the judge on a motion to compel or for protective order. In sum, the Department's new rules on disclosure and discovery of ESI track the provisions in the FRCP which were developed after consideration of the competing interests at stake with regard to ESI, and the Department is not persuaded that a different approach is necessary or desirable in proceedings before the OALJ.

The Department received one comment concerning the timing of initial disclosures for parties who are served or joined later. The commenter proposed adding the following sentence to the end of paragraph (c)(1)(v): "Copies of all prior disclosures shall be served on the newly joined party within 14 days of the joinder." Such an addition is helpful because it is common in LHWCA and BLBA cases for additional parties to be joined after the commencement of the OALJ proceeding. Therefore, the Department has added the following sentence to the end of paragraph (c)(1)(v) in the final rule: Copies of all prior disclosures must be served on a newly served or joined party within 21 days of the service or joinder.

Two comments advocated adoption of early discovery protocols similar to the pilot project that has been implemented by some federal district courts to streamline discovery and reduce costs in certain employment discrimination cases. See FEDERAL JUDICIAL CENTER, PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011), available at [www.fjc.gov/public/pdf.nsf/lookup/discempl.pdf/\\$file/discempl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/discempl.pdf/$file/discempl.pdf). Incorporating a pilot project designed for a limited class of cases into a set of uniform rules of practice

and procedure is not desirable. To the extent such initiatives may be beneficial in certain cases, the Department has concluded that the determination to adopt such procedures is best left to the discretion of individual judges and/or discovery plans developed by parties pursuant to paragraph (b)(3).

One comment proposed that paragraph (d)(3) should be revised to explicitly state that it does not apply to LHWCA and BLBA proceedings because 33 U.S.C. 927(b) expressly provides a procedure (i.e., certification of facts to a federal district court for summary contempt proceedings) for addressing discovery violations. A party's failure to comply with the certification requirements likely would not involve refusal to comply with an order and, therefore would not be cognizable as contempt subject to section 927(b). See A-Z Intn'l v. Phillips, 323 F.3d 1141, 1146-47 (9th Cir. 2003) (holding that the district court lacked section 927(b) jurisdiction over conduct that did not involve a refusal "to comply with a summons, writ, warrant, or mandate issued by the ALJ."). The Department therefore rejects this proposal and has not made any change to paragraph (d)(3).

§ 18.51 Discovery scope and limits. One comment suggested that the language of paragraph (a) defining the scope of discovery could be read as precluding discovery of prior medical records. The commenter focused this concern on the second sentence of the rule which states that "the judge may order discovery of any matter relevant to the subject matter involved in the proceeding." The commenter preferred language limiting discovery to matters "relevant to the subject matter of the proceeding" and, alternatively, suggested that the record should clearly state that prior medical records are relevant to a party's claim or defense when medical questions are at issue. The Department rejects

this proposal as essentially seeking a substantive determination that prior medical records are discoverable without limitation in all proceedings as long as there is some medical issue in play. While such records may well be relevant and discoverable in many cases where medical issues are raised, it is not difficult to foresee situations where production of a person's prior medical records might not be required. In the Department's view, determinations as to the scope of discovery with respect to specific categories of information cannot be properly addressed in a general procedural rule and, instead, must be left to case-by-case adjudication.

Another comment stated that the exceptions established by paragraph (d)(3)(i) through (iii) to the general rule embodied in paragraphs (c)(1) and (2) which protect against disclosure of communications between a party's representative and an expert witness are not adequate to ensure access to evidence of fraud, abuse or influence such as a party's attorney writing the expert's report. The commenter suggested that the exceptions should be broadened to ensure disclosure of such evidence or that paragraphs (c)(1) and (c)(2) should be eliminated. The Department's new rules addressing disclosure of communications between a party's representative and an expert track the provisions of FRCP 26(b)(3) and (4), which were revised in 2010. While the Civil Rules Advisory Committee stated that the revisions to FRCP 26 were intended to alter pre-amendment case law that required disclosure of all attorney-expert communications and draft reports in favor of limiting disclosure to communications of a factual nature in order to protect the theories and mental impressions of counsel, the Advisory Committee emphasized that the "facts or data" exception should be interpreted broadly to require disclosure of "any facts or data 'considered' by the expert in forming the opinions to be

expressed, not only those relied upon by the expert.” Fed. R. Civ. P. 26 advisory committee’s note (discussion of 2010 amendments); see also Sara Lee Corp. v. Kraft Foods, Inc., 273 F.R.D. 416, 419 (N.D. Ill. 2011); Fialkowski v. Perry, No. 11–5139, 2012 WL 2527020, at \*5 (E.D. Pa. Jun. 29, 2012) (holding that even if the requested documents are considered “communications” between a party’s attorney and an expert within the meaning of FRCP 26(b)(4)(C), they are discoverable to the extent that they fall within the exceptions listed in FRCP 26(b) (4)(C)(ii) and (iii), for “facts and data” that the expert considered and for “assumptions” that the expert relied on). The Department believes that the rule adequately addresses the concern raised in the comment, and no change has been made in the final rule.

The Department received a comment stating that some of the commentary in the NPRM relating to limitations on the scope of discovery could lead judges to believe that limiting discovery is more important than providing whistleblower complainants with access to the evidence they need to prove their claims. This commenter pointed out that discovery is critical in whistleblower litigation where “smoking gun” evidence of unlawful motivation is rare, and he suggests that it would be helpful if the comments accompanying the final rule are balanced to recognize that while judges have discretion to limit unnecessary discovery, they also have a duty to enforce discovery when it is necessary to prove a relevant point. The commenter did not suggest any change in the proposed rule establishing the scope of discovery and its limits. The Department notes that the discussion of the changes in the disclosure and discovery rules in the NPRM contains several references to limitations on the scope of discovery which were necessitated by recent changes in the FRCP that were incorporated into the new §18.51.

However, the Department believes the new rule, like FRCP 26(b) upon which it is based, appropriately balances competing discovery interests.

Another commenter similarly suggested with respect to whistleblower cases that the rules should encourage early exchange of discoverable information, prompt resolution of discovery disputes and broad discovery of probative information. This commenter also did not advocate any particular change in the proposed rule. The Department believes that the new disclosure and discovery rules, taken as a whole, are designed to accomplish the commenter's recommended objectives in a fair and impartial manner. The Department further believes that adoption of special disclosure and discovery rules for a particular category of cases is neither necessary nor desirable as judges have discretion to resolve discovery disputes in a manner that is consistent with the requirements of the particular governing statute and implementing regulations. The Department therefore has not made any change to the new rules based on this comment.

§ 18.55 Using depositions at hearings. Two commenters suggested that the new rule should be revised to permit wider use of depositions at hearings. One commenter proposed addition of a paragraph that would permit unconditional use of depositions at hearings in the absence of any objection. The commenter submitted that this revision would better align the rule with current practice and procedure. Another commenter urged deletion of the requirement of showing unavailability as a pre-condition to the admission of deposition testimony from a lay or non-expert witness. This commenter asserted that the unavailability requirement is overly burdensome and particularly so for benefits claimants who have fewer resources to pay witnesses to attend hearings. The Department agrees. Allowing unconditional use of depositions in the absence of an

objection comports with current practice and procedure and reduces the potential financial burden of producing live witnesses on all parties. While the proponent of using the deposition of a non-expert witness at hearing would still be required to demonstrate unavailability in the face of an objection, the Department believes that the unavailability provisions of the rule, which track FRCP 32(a)(4), are sufficiently broad to minimize the burden of producing live witnesses. Accordingly, the new rule has been revised and renumbered to add a new paragraph allowing unconditional use of depositions at hearings in the absence of an objection.

§ 18.56 Subpoenas. The Department received two comments regarding the provisions of paragraph (a) relating to issuance of subpoenas. One of the commenters proposed that the rule state that any attorney authorized to practice under the rules may issue subpoenas and that the judge may issue subpoenas on written application of a non-attorney. The other comment urged that paragraph (a)(3), which would permit a judge by order in a specific proceeding to authorize an attorney representative to issue and sign subpoenas, be revised to exempt LHWCA and BLBA proceedings because 33 U.S.C. 927(a) expressly delegates subpoena issuance authority to judges who cannot sub-delegate such authority to persons outside the Department. The Department is persuaded by this latter argument that the authority to issue subpoenas should remain with the judge. The comment cited two cases—FTC v. Gibson, 460 F.2d 605 (5th Cir. 1972), and United States v. Marshall Durbin & Co. of Haleyville, 363 F.2d 1 (5th Cir. 1966),—where sub-delegation of statutory subpoena authority to subordinate employees of an agency was upheld based on reorganization plans, authorized by the Reorganization Act of 1949, 5 U.S.C. 901-912, that specifically provided for the challenged sub-delegation of subpoena

power. See also Lewis v. NLRB, 357 U.S. 10, 14-15 (1958) (upholding sub-delegation of subpoena authority to the Board's regional directors). Unlike the cited cases, there is no reorganization plan under which the Department's judges have been authorized to sub-delegate statutory subpoena authority. Consequently, a question exists as to whether the sub-delegation authorized by paragraph (a)(3) would withstand legal scrutiny. The Department has therefore deleted paragraph (a)(3) from the new rule. This revision renders moot the concerns raised by the other commenter about the need for additional protective procedures to protect parties from abusive subpoena practices by parties' representatives in the event they were authorized to issue subpoenas.

The Department received a comment that paragraph (b)(1) dealing with service of subpoenas be revised to track a change in FRCP 45(a)(4), upon which the rule is patterned, that was recommended to the U.S. Supreme Court by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in its report of September 2012. See FEDERAL RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23 (2012), available at [www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2012.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2012.pdf). To maintain harmony with the FRCP, the commenter proposed that paragraph (b)(1) be amended to read as follows:

By whom; tendering fees; serving a copy of certain subpoenas. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena

requires that person's attendance, tendering with it the fees for 1 day's attendance and the mileage allowed by law. Service may also be made by certified mail with return receipt. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before the formal hearing, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

The Department adopts this proposal as consistent with the objective of bringing the OALJ rules of practice and procedure into alignment with the FRCP where appropriate. Paragraph (b)(1) in the final rule has been amended accordingly.

The Department received two additional comments regarding paragraph (b)(1). One commenter raised a concern that the phrase "allowed by law" is vague and should be replaced by a reference to the particular controlling law. The language in question is taken verbatim from FRCP 45(a)(4) and is intended to be interpreted in a manner consistent with the federal rule under which witness fees and expenses are currently controlled by 28 U.S.C. 1821. See Dishman v. Cleary, 279 F.R.D. 460, 466 (N.D. Ill. 2012); Fisher v. Ford Motor Co., 178 F.R.D. 195, 197 (N.D. Ohio 1998). The Department does not believe that it is prudent to incorporate specific statutory references into the rule as statutory provisions are subject to change which would lead to potential confusion until the rule could be amended. Further, the Department notes that the discovery subcommittee to the Civil Rules Advisory Committee undertook an exhaustive survey of published commentary regarding FRCP 45. See FEDERAL RULES OF PRACTICE



& PROCEDURE, SURVEY OF ISSUES REGARDING FEDERAL RULE OF CIVIL PROCEDURE 45 (2009), available at [www.uscourts.gov/uscourts/RulesAndPolicies/rules/Memo re Rule 45 issues.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Memo%20re%20Rule%2045%20issues.pdf). Review of the survey discloses no published concern or comment or other criticism related to the use of “allowed by law.”

The second commenter proposed a requirement that notice of a subpoena(s) relating to medical or financial information include a statement certifying that the information will not be used or disclosed for any purpose other than the litigation or proceeding for which the information was requested and will be destroyed or returned at the end of the litigation or proceeding. The commenter stated that this additional provision is necessary to protect against inadvertent disclosure of sensitive information. The Department rejects this proposal, noting that the handling of sensitive information obtained during discovery should be addressed in parties’ discovery plans under §18.50(b)(3) and that any unresolved issues relating to sensitive information may more appropriately be addressed by the judge on a case-by-case basis under the protective order procedures in §18.52.

One commenter proposed that paragraph (c)(1), requiring a judge to impose an appropriate sanction on a party or representative who violates the duty to avoid imposing an undue burden on a person subject to a subpoena, be revised to explicitly state that it does not apply to LHWCA and BLBA proceedings which are subject to the summary contempt procedure established by 33 U.S.C. 927(b). The Department declines to adopt the commenter’s suggestion for the reasons detailed above in section II, “Conflicts with the LHWCA and BLBA.”

§ 18.57 Failure to make disclosures or to cooperate in discovery; sanctions. Two comments proposed revising the rule to specifically exempt LHWCA and BLBA cases from the sanction provisions which, the commenters argued, are preempted by section 927(b) of the LHWCA. One of the commenters additionally argued that these sanction provisions violate the “separation of powers” doctrine by usurping contempt powers solely vested in the Article III courts. The Department declines to adopt the commenters’ suggestions for the reasons detailed above in section II, “Conflicts with the LHWCA and BLBA.”

§ 18.62 Physical and Mental Examinations. One commenter suggested that §18.62(a)(1) should be amended to restrict an examination to the mental or physical “condition in controversy.”

The Department declines to adopt the commenter’s suggestion. The suggested text would offer no meaningful limit because the medical examiner does not know how the issues have been framed in litigation. The party who retains an examiner and notices the examination however knows the scope of the report it retains an examiner to prepare. The Department believes it is preferable to rely on the language taken from FRCP 35(a), which requires the party who notices an examination to specify the “time, place, manner, conditions, and scope of the examination,” and to disclose the “person or persons who will perform it.” The notice must also describe the examination in a way that informs the party to be examined of its scope. That party may object if the conditions or scope of the examination stray into areas that are not in controversy.

Two commenters argued that the final rule should retain the 30-day notice requirement found in previous §18.19(4)(d). One commenter stated that the new 14-day

notice requirement would unreasonably burden the claimant. Specifically, the shorter notice period would make it harder for the claimant to arrange for time off from work, travel plans, and other matters. The commenters also asserted that §18.62(a)(4) would not give sufficient time to object to the examination notice with particularity. The person to be examined may have to consult with others (such as experts or a treating physician) to frame and serve a specific objection.

The Department agrees with the commenters' suggestions. Therefore, §18.62(a)(3) is amended to provide a notice period of 30 days in advance of an examination when the parties do not agree to a shorter notice in their proposed discovery plan, by stipulation, or through informal discussion. Section 18.62(a)(4) is amended to extend the time to serve an objection from 7 days to 14 days.

One commenter suggested that the text of the rule on physical and mental examinations should mandate a three-step procedure before an examination can be noticed: (1) the parties must attempt to resolve all issues informally before an examination is noticed; (2) if agreement cannot be reached, the party that intends to notice an examination must request a telephone or other prehearing conference with the judge to discuss whether an examination is needed, and any specific procedure or limitations on the examination that may be appropriate; and (3) before the prehearing conference, the party proposing the examination must state with particularity why the examination is needed, why the deposition of the party to be examined is insufficient to address the issues the examination would address, and describe what will occur at the examination.

The Department declines to adopt the commenter's proposal. First, the parties ordinarily should have discussed whether an examination is appropriate, and its scope, when they frame the proposed discovery plan early in the case, just as happens in the U.S. district courts. Second, the claims at the OALJ frequently involve a physical or mental condition that serves as one of the bases raised for relief—an issue that is litigated less often in U.S. district courts. It makes sense therefore for the default assumption in the rules to be that an examination is appropriate in cases before the OALJ, even though FRCP 35 allows such examinations only upon motion for good cause before the U.S. district courts.

One commenter suggested that §18.62(c)(1) be amended to require that the examination report (1) be delivered to the examined party within 21 days, (2) be delivered no fewer than 45 days before the hearing, and (3) fulfill the requirements of expert testimony found in proposed §18.50(c)(2)(ii) [required for witnesses who must provide a written report].

The Department declines to adopt these additional requirements. Section 18.62 establishes a procedure to set an examination. It should not be conflated with the separate disclosures a party must make before final hearing, particularly about the testimony of experts. The examiner may not be a trial witness. The examination report may be only a portion of the data an expert witness who testifies at final hearing rely on to reach an opinion. Section 18.50(c)(2)(ii) has an independent effect. With respect to the timing of reports, the parties should build into the discovery plan an appropriate period for the examiner to write and serve a report, which can be incorporated into a prehearing order. To ensure the party examined has the examination report promptly,

however the Department agrees that the party who retained the examiner and receives the examination report must serve a copy of the examination report on the party examined no later than seven days after it receives the report.

§ 18.64 Depositions by oral examination. One commenter asserted that an ALJ cannot impose the sanctions enumerated in §18.57 in LHWCA and BLBA adjudications for the types of misconduct described in § 18.64(d)(2) and (g). Therefore, the commenter suggested that the Department add an exception to the rules for these cases. The Department declines to amend §18.64 to provide such an exception for the reasons detailed above in section II, “Authority to Regulate the Conduct of Administrative Proceedings; Sanctions” and “Conflicts with the LHWCA and BLBA.”

§ 18.64 Depositions by oral examination and § 18.65 Depositions by written questions. One commenter stated that proposed §§18.64 and 18.65 refer to an “officer,” but do not clarify the “officer’s” relations to the deposition proceeding. FRCP 30(b)(5) and 31(b) use the term “officer” to describe the court reporter who administers the oath, takes and certifies the testimony, states that the deposition is complete when it ends, and reads the written deposition questions. The Department agrees with the commenter that the title to §§18.64(b)(5) and 18.65(b) should be altered to clarify that the “officer” is the “deposition officer.”

§ 18.70 Motions for dispositive action. One commenter objected generally to the use of motions to dismiss in proceedings where there are shifting burdens of proof or where the claimant benefits from legal presumptions. The commenter argued specifically that §18.70(c) should be stricken or made not applicable to cases under the LHWCA because such a rule would require claimants to plead with more specificity than required

under the Act, and noted that an injury and timely filing are presumed. The Department declines to strike or modify §18.70(c). That section states that a party is permitted to move to dismiss part or all of the matter “for reasons recognized under controlling law.” The new section is not intended to modify existing law controlling the standard for dispositive motions, including motions challenging the sufficiency of a pleading. Moreover, §18.10(a) states that “[t]o the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls.” Thus, a party’s motion to dismiss under §18.70(c) does not upset any statutory or regulatory presumptions or shifting burdens of proof.

§ 18.72 Summary decision. One commenter argued for the development of a rule that would allow ALJs to enter summary decision in a condensed order that is compliant with the APA, but which does not require a complete recitation of all evidence. The commenter argued that such a summary ruling would minimize judges’ workload and allow for quicker adjudications. The commenter suggested that the rules permit such a summary ruling upon agreement of the parties because without such a provision in the rules, parties will have concerns about whether such an order would be deemed deficient by the BRB. Because the APA specifies what must be included in an ALJ’s decision and order, the Department declines to modify §18.72 to provide for a condensed decision on summary decision. Section 18.72(a) provides that the judge should state on the record the reasons for granting or denying a motion for summary decision or partial summary decision.

Two commenters stated that the use of summary adjudications is inconsistent with the goal of fair administrative proceedings for whistleblowers and should be rarely, if

ever, used. The commenters argued that summary decisions based on written submissions favor employers over employees and increase costs. The commenters argued that summary decisions deprive the ALJ of the opportunity to determine the credibility of the witnesses, which is important in cases where motive and intent are critical issues. The commenters recommended that §18.72 state that summary judgment is generally considered inappropriate in administrative proceedings.

The Department declines to revise §18.72 to state that summary decision is inappropriate in administrative proceedings, in general, or in whistleblower proceedings, in particular. The utility of a summary decision procedure for agencies having a substantial caseload of formal adjudications has long been recognized. See Summary Decision in Agency Adjudication,<sup>1</sup> CFR 305.70-3 (1995) (ACUS Recommendation 70-3, available at [www.acus.gov/sites/default/files/documents/70-3.pdf](http://www.acus.gov/sites/default/files/documents/70-3.pdf)). Section 18.72 is a procedural rule applicable to the many types of adjudications conducted by the OALJ, and is neutral on the question of whether summary decision as a procedural mechanism is disproportionately adverse to the interests of whistleblower complainants. Any rulemaking proposing a regulation discouraging summary decision in whistleblower cases is within the responsibility and purview of the agency which has programmatic and policy responsibility over whistleblower cases, and not the OALJ, whose role is adjudicatory. Moreover, the ARB has issued several decisions that provide ample guidance to the public and to judges on the standards specific to summary decision motions in whistleblower cases. See Evans v. E.P.A., ARB No. 08-059, ALJ No. 2008-CAA-3 (ARB Apr. 30, 2010); Hasan v. Enercon Serv., Inc., ARB No. 10-061, ALJ Nos. 2004-ERA-22 and 27 (ARB July 28, 2011); Lee v. Parker-Hannifin Corp., Advanced

Prod. Bus. Unit, ARB No. 10-021, ALJ No. 2009-SWD-3 (ARB Feb. 29, 2012); Franchini v. Argonne Nat'l Lab., ARB No. 11-006, ALJ No. 2009-ERA-14 (ARB Sept. 26, 2012); see also Guillory v. Domtar Indus., 95 F.3d 1320, 1326 (5th Cir. 1996) (“Though summary judgment is rarely proper when an issue of intent is involved, the presence of an intent issue does not automatically preclude summary judgment; the case must be evaluated like any other to determine whether a genuine issue of material fact exists.”).

Another commenter objected that motions for summary judgment allow cases to be framed by the party that does not have the burden of proof at trial, and that under §18.72, the moving party gets the last word. The commenter described complainants being “sandbagged” by primary briefs that provide abbreviated or unclear statements of facts or arguments, which are tactically written to prevent cogent or complete responses. Then, complainants are faced with reply briefs that clarify or even add arguments and provide additional authorities in support of those arguments. The commenter stated that many circuit courts deal with this problem by allowing surreply briefs, or by expressly limiting reply briefs to the four corners of the arguments made by the non-moving party in opposition to summary judgment. Thus, the commenter suggested a rule that specifically allows for a surreply, makes clear that the reply and surreply may only respond to material in the opposing submission, and states that all “new” material be disregarded by the court.

The Department declines to revise §18.72 to expressly allow surreply briefs, or to expressly limit reply briefs to the four corners of the arguments made by the non-moving party in opposition to summary judgment. OALJ judges have the power necessary to



conduct fair and impartial proceedings, and are capable of dealing with a parties' raising of new arguments in reply briefs without a specific rule. For example, in Du Jardin v. Morrison Knudsen Corp., 1993-TSC-3 (ALJ Nov. 29, 1993), the ALJ refused to consider new arguments raised by the respondent in a reply brief to the complainant's response to the respondent's motion for summary decision. In Inman v. Fannie Mae, 2007-SOX-47 (ALJ Mar. 5, 2008), rev'd and remanded on other grounds, Inman v. Fannie Mae, ARB No. 08-060, ALJ No. 2007-SOX-47 (ARB June 28, 2011), the ALJ permitted the complainant to file a surreply on a motion for summary decision. The Department notes that under FRCP 56, on which §18.72 is modeled, there is no right to file a surreply. Although the commenter stated that many circuit courts allow surreply briefs, it did not identify those circuits. Our review of federal appellate court rules and circuit court local rules found that the rules generally do not mention surreply briefs, or only allow them upon leave of the court. See, e.g., Dist. N.M. Local R. Civ. P. 7.4(b) (2013); Dist. N.H. Local R. 7.1e(3) (2013).

Two commenters suggested that the timing aspects of §18.72 will be troublesome for whistleblower complainants, for whom the efficiency and cost of opposing motions for summary judgment is of paramount importance. Motions for summary decision are usually filed by respondents, and consequently, when such motions are filed near to the hearing date, complainants are disadvantaged because they are severely burdened by the need to respond to the motion and prepare for the evidentiary hearing within a short time period. The commenters recommended that: 1) substantive summary motions aimed at eliminating claims or types of damages should be filed no later than 90 days prior to a hearing date; 2) counsel responding to such motions should have 21 to 30 days to file

their responsive pleadings; and 3) all such motions should be resolved at least 30 days prior to a hearing date.

The Department declines to revise §18.72 to require summary decision motions be filed no later than 90 days prior to a hearing date. Prior §18.40(a) provided that a party may file a motion for summary decision at least 20 days before the date fixed for any hearing. With the new §18.72, the Department increased the timeframe for filing motions for summary decision to 30 days before the date fixed for the formal hearing. In the OALJ's experience, this timeframe would generally afford sufficient time for all parties and the judge to address the motion. As noted in the new §18.10(a), the OALJ rules of practice and procedure are to be administered to secure the just, speedy, and inexpensive determination of every proceeding. In whistleblower cases, in particular, the regulations direct that hearings are to commence expeditiously. See, e.g., 20 CFR 179.107(b). Moreover, if necessary, §18.72 gives the ALJ the discretion to adjust deadlines, as appropriate.

One comment argued that §18.72(h) should be revised to explicitly state that it does not apply in proceedings under the LHWCA and the BLBA because 33 U.S.C. 927(b) expressly provides a procedure (i.e., certification of facts to a federal district court for summary contempt proceedings) for resistance of a lawful order, misconduct during hearings, and discovery violations. The commenter thus argued that the sanctions listed in the §18.72(h) are unavailable to ALJs presiding in hearings under the LHWCA or BLBA. The Department declines to adopt the commenters' suggestion for the reasons detailed above in section II, "Conflicts with the LHWCA and BLBA."

§ 18.80 Prehearing statement. The Department added a requirement that a participating party file a prehearing statement at least 21 days prior to the date set for hearing. Prior §18.7 did not have a requirement for filing prehearing statements.

A commenter proposed that the time for filing the prehearing statement be extended to 45 days prior to hearing to allow the parties time to ascertain if additional discovery is needed, and to prevent the need for continuances to conduct discovery on witnesses and evidence not timely disclosed. The commenter argued that the additional time will preclude post trial depositions to rectify untimely disclosed information. The Department declines to extend the date for submission of the prehearing statement and notes that the rule allows for the judge to order a different time frame, if appropriate.

A commenter objected to the statement in the NPRM that the Department proposed to add a new regulation at §18.80(e) requiring a party to file objections to an opposing party's proposed exhibits or use of deposition testimony within 14 days of being served, and that failure to object waives an objection unless the judge finds good cause for failure to object. The NPRM is in error. The new rule does not include such a provision.

§ 18.84 Official notice. The Department clarifies procedures in §18.84 that a judge may follow when taking judicial notice. The rule provides that official notice may be taken of any adjudicative fact or other matter subject to judicial notice, and the parties must be given an adequate opportunity to show the contrary of the matter noticed.

A commenter objected to a practice by ALJs in BLBA claims of taking official notice of the Dictionary of Occupational Titles (4th ed. Rev. 1991). He contended that such practice invades upon the province of a medical expert who must consider job duties

and tasks in assessing whether a pulmonary impairment would or would not prevent the performance of such tasks. Although the Department agrees with the commenter that a matter subject to judicial notice is a matter whose accuracy cannot be reasonably questioned, it declines to identify specific matters for which official notice is not appropriate. The rule states that parties must be given an adequate opportunity to show the contrary of the matter noted. The Department accordingly declines to amend this provision.

§ 18.87 Standards of conduct. The Department relocated the prior §18.36 to §18.87 and divided the prior paragraph (b) into two paragraphs: (b) Exclusion for misconduct, and (c) Review of representative's exclusion. A commenter contended that the rule should be revised to explicitly state that §18.87 does not apply in proceedings under the LHWCA and BLBA. The commenter reasoned that rules of procedure apply only to the extent that they are consistent with the BLBA or its implementing regulations, and since the LHWCA and BLBA contain a specific statutory provision dealing with the resistance of an order, misconduct during hearings, and discovery violations, 33 U.S.C. 927(b), the sanction provisions under either the Rules of Practice and Procedure before the OALJ or the FRCP do not apply. The commenter also objected to the rule because Congress did not vest the OALJ with contempt powers. The Department declines to adopt the commenters' suggestion for the reasons detailed above in section II, "Conflicts with the LHWCA and BLBA."

§ 18.88 Transcript of proceedings. Section 18.88(b) of the new rule states that motions to correct the official transcript must be filed within 14 days of the receipt of the transcript unless the judge permits additional time. A commenter suggested that motions

to correct be filed seven days after filing of the post-hearing brief. The commenter reasoned that attorneys typically review the transcript as they write the brief, and that counsel can be more helpful in this regard after they have reviewed the transcript in preparation for their brief. The Department declines to extend the date for motions to correct. The Department contemplates that parties would have a corrected transcript at the time they prepare their brief. Also, the rule allows for correction of errors discovered during preparation of a brief, as the rule provides that a judge may correct errors in the transcript at any time before issuing a decision and upon notice to the parties.

§ 18.92 Decision and order. The Department revised the prior §18.57 into two sections, §18.91, Post-hearing Briefs; and §18.92, Decision and Order. The language that the Department deleted stated that the ALJ was to issue a decision within a “reasonable time” after receiving the parties’ filings or within 30 days after receiving the parties’ consent findings. Two commenters submitted concerns about the new §18.92. They observed that, under the current practice, parties “have no mechanism or ability to know when decisions will be issued,” and expressed concern that delays adversely impact both employers and employees. The Department has determined that questions about how long it takes the OALJ’s judges to issue their decisions are best handled as matters of policy and resource allocation. The Department therefore declines to adopt the commenters’ suggestions that §18.92 be amended to include a timeframe for issuance of a judge’s decision.

§ 18.93 Motion for reconsideration. The prior rule contained no general provision on motions for reconsideration of decisions and orders. The Department added

a new provision stating that motions for reconsideration of a decision and order must be filed within 10 days after service of the decision on the moving party.

One commenter suggested that the provision be amended to permit motions for reconsideration to be filed within 30 days, instead of the 10 days in the new rule. The commenter stated that the BLBA regulation permits such motions to be filed within 30 days. 20 CFR 725.479(b). In the commenter's view, its proposal will provide for uniformity among all types of cases. The commenter also indicated that a longer time period for such motions will obviate the need to submit motions for extensions of time to file motions for reconsideration, and will provide practitioners and their clients with sufficient time to make informed decisions about whether to even file motions for reconsideration. Broad motions aimed at all issues will thus be avoided and the resulting burden on ALJs will be reduced.

As the commenter correctly indicated, and as mentioned in the NPRM, the new rule is modeled after FRCP 59(e), which gives parties 28 days from the date of entry of a judgment to file a motion to alter or amend the judgment. A motion for reconsideration may be filed in BLBA cases within 30 days. 20 CFR 725.479(b). Compensation orders in LHWCA cases similarly are final 30 days after filing unless other proceedings are instituted.

The Department considered other timeframes for motions for reconsideration that were more in line with FRCP 59(e) or 20 CFR 725.479(b). However, some of the Department's regulations pertaining to specific statutes within the OALJ's purview state that the ALJ's decision and order is final, unless a petition for review is filed with the ARB within a specific time, less than 30 days from service of the ALJ's decision and

order. See, e.g., 29 CFR 1978.109(e)(specifying 14 days for cases under the Surface Transportation Assistance Act); 29 CFR 1980.110(e) (specifying 10 days for cases under the Sarbanes-Oxley Act); 29 CFR 1992.110(a)(specifying 10 days for cases under the National Transit Systems Security Act/Federal Railroad Safety Act). Permitting a party to move for reconsideration after the date that a petition for review must be filed with the ARB would be inconsistent with the Department's position regarding finality of ALJ decisions in such cases. Additionally, if the deadline for submitting a motion for reconsideration is after the deadline for submitting a petition for review, if a motion for reconsideration is not submitted, a party may thereby inadvertently foreclose its options regarding appeal. The Department therefore declines to adopt the commenter's suggestion regarding the number of days within which motions for reconsideration can be filed.

#### IV. CROSS REFERENCING CHART

To assist in the transition to the revised Subpart A, the chart below provides cross references between the new section and section title, and the old section and section title of each rule. The chart also provides cross references to the corresponding FRCP rule, where applicable. Finally, the chart lists the sections from the old Subpart A that have been deleted.

#### **PART 18, SUBPART A—CROSS REFERENCING CHART**

<b>New Section</b>	<b>New Section Title</b>	<b>Old Section</b>	<b>Old Section Title</b>	<b>Federal Rule of Civil Procedure</b>
<b>GENERAL PROVISIONS</b>				
<b>18.10</b>	<b>Scope and purpose</b>	18.1/18.26	Scope of rules and conduct of hearings	FED. R. CIV. P. 1
<b>18.11</b>	<b>Definitions</b>	18.2	Definitions	
<b>18.12</b>	<b>Proceedings before administrative law judge</b>	18.25/18.29(a)	Proceedings before administrative law judge /authority of the administrative law judge	
<b>18.13</b>	<b>Settlement judge procedure</b>	18.9	Consent order or settlement; settlement judge procedure	
<b>18.14</b>	<b>Ex parte communication</b>	18.38	Ex parte communications	
<b>18.15</b>	<b>Substitution of administrative law judge</b>	18.30	Unavailability of administrative law judge	FED. R. CIV. P. 63
<b>18.16</b>	<b>Disqualification</b>	18.31	Disqualification	
<b>18.17</b>	<b>Legal assistance</b>	18.35	Legal assistance	
<b>PARTIES AND REPRESENTATIVES</b>				
<b>18.20</b>	<b>Parties to a proceeding</b>	18.10	Parties, how designated	
<b>18.21</b>	<b>Party appearance and participation</b>	18.39/18.34(a)	18.39, Waiver of right to appear and failure to participate or to appear – text was incorporated into proposed “participation” rule	
<b>18.22</b>	<b>Representatives</b>	18.34	Representatives	
<b>18.23</b>	<b>Disqualification of representatives</b>			
<b>18.24</b>	<b>Briefs from amicus curiae</b>	18.12	Amicus curiae	
<b>SERVICE, FORMAT AND TIMING OF FILINGS AND OTHER PAPERS</b>				
<b>18.30</b>	<b>Service and filing</b>	18.3	Service and filing	FED. R. CIV. P. 5
<b>18.31</b>	<b>Privacy protection for filings and exhibits</b>			FED. R. CIV. P. 5.2
<b>18.32</b>	<b>Computing and extending time</b>	18.4	Time computations	FED. R. CIV. P. 6
<b>18.33</b>	<b>Motions and other</b>	18.6	Motions and requests	FED. R. CIV.



	<b>papers</b>			P. 7(b) & 43(c)
<b>18.34</b>	<b>Format of papers filed</b>			
<b>18.35</b>	<b>Signing motions and other papers; representations to the judge; sanctions</b>			FED. R. CIV. P. 11
<b>18.36</b>	<b>Amendments after referral to the Office of Administrative Law Judges</b>	18.5	Responsive pleadings—answer and request for hearings	
<b>PREHEARING PROCEDURE</b>				
<b>18.40</b>	<b>Notice of hearing</b>	18.27	Notice of hearing	
<b>18.41</b>	<b>Continuances and changes in place of hearing</b>	18.28	Continuances	
<b>18.42</b>	<b>Expedited proceedings</b>	18.42	Expedited proceedings	
<b>18.43</b>	<b>Consolidation; separate hearings</b>	18.11	Consolidation of hearings	FED. R. CIV. P. 42
<b>18.44</b>	<b>Prehearing conference</b>	18.8	Prehearing conferences	FED. R. CIV. P. 16
<b>DISCLOSURE AND DISCOVERY</b>				
<b>18.50</b>	<b>General provisions governing disclosure and discovery</b>			FED. R. CIV. P. 26 (a), (d), (f), (g)
<b>18.51</b>	<b>Discovery scope and limits</b>	18.14	Scope of discovery	FED. R. CIV. P. 26 (b)
<b>18.52</b>	<b>Protective orders</b>	18.15	Protective orders	FED. R. CIV. P. 26 (c)
<b>18.53</b>	<b>Supplementing disclosures and responses</b>	18.16	Supplementation of responses	FED. R. CIV. P. 26 (e)
<b>18.54</b>	<b>Stipulations about discovery and procedure</b>	18.17	Stipulations regarding discovery	FED. R. CIV. P. 29
<b>18.55</b>	<b>Using depositions at hearings</b>	18.23	Use of depositions at hearings	FED. R. CIV. P. 32
<b>18.56</b>	<b>Subpoena</b>	18.24	Subpoenas	FED. R. CIV. P. 45
<b>18.57</b>	<b>Failure to make disclosures or to cooperate in discovery; sanctions</b>	18.21	Motion to compel discovery	FED. R. CIV. P. 37

<b>TYPES OF DISCOVERY</b>				
<b>18.60</b>	<b>Interrogatories to parties</b>	18.18	Written interrogatories to parties/	FED. R. CIV. P. 33
<b>18.61</b>	<b>Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.</b>	18.19	Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination	FED. R. CIV. P. 34
<b>18.62</b>	<b>Physical and mental examinations</b>	18.19	Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination	FED. R. CIV. P. 35
<b>18.63</b>	<b>Requests for admission</b>	18.20	Admissions	FED. R. CIV. P. 36
<b>18.64</b>	<b>Depositions by oral examination</b>	18.22	Depositions by oral examinations	FED. R. CIV. P. 30
<b>18.65</b>	<b>Depositions by written questions</b>			FED. R. CIV. P. 31
<b>DISPOSITION WITHOUT HEARING</b>				
<b>18.70</b>	<b>Motions for dispositive action</b>			
<b>18.71</b>	<b>Approval of settlement or consent findings</b>	18.9		
<b>18.72</b>	<b>Summary decision</b>	18.40/18.41	18.40, Motion for summary decision <u>merged with</u> 18.41, Summary decision	FED. R. CIV. P. 56
<b>HEARING</b>				
<b>18.80</b>	<b>Prehearing statement</b>	18.7	Prehearing statements	
<b>18.81</b>	<b>Formal hearing</b>	18.43	Formal hearings	FED. R. CIV. P. 43(a)
<b>18.82</b>	<b>Exhibits</b>	18.47/18.48 18.49/18.50	Exhibits/ records in other proceedings/ designation of parts of documents/ authenticity	
<b>18.83</b>	<b>Stipulations</b>	18.51	Stipulations	

<b>18.84</b>	<b>Official notice</b>	18.45	Official notice	
<b>18.85</b>	<b>Privileged, sensitive, or classified material</b>	18.46/18.56	In camera and protective orders/ restricted access	
<b>18.86</b>	<b>Hearing room conduct</b>	18.37	Hearing room conduct	
<b>18.87</b>	<b>Standards of conduct</b>	18.36	Standards of conduct	
<b>18.88</b>	<b>Transcript of proceedings</b>	18.52	Record of hearings	
<b>POST HEARING</b>				
<b>18.90</b>	<b>Closing the record; subsequent motions</b>	18.54/18.55	Closing the record /receipt of documents after hearing	
<b>18.91</b>	<b>Post-hearing brief</b>	18.57	Decision of the administrative law judge and post-hearing briefs	
<b>18.92</b>	<b>Decision and order</b>	18.57	Decision of the administrative law judge and post-hearing briefs	
<b>18.93</b>	<b>Motion for reconsideration</b>			FED. R. CIV. P. 59 (e)
<b>18.94</b>	<b>Indicative ruling on a motion for relief that is barred by a pending petition for review</b>			FED. R. CIV. P. 62.1
<b>18.95</b>	<b>Review of Decision</b>	18.58	Appeals	
<b>DELETED SECTIONS</b>				
	Deleted	18.13	Discovery methods	
	Deleted	18.32	Separation of functions	
	Deleted	18.33	Expedition	
	Deleted	18.53	Closing of hearings	
	Deleted	18.59	Certification of official record	

## **List of Subjects in 29 CFR Part 18**

Administrative practice and procedure, Labor

**SIGNED:** at Washington, D.C., this \_7 of May, 2015.

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**Thomas E. Perez**

**Secretary of Labor**

For the reasons set forth in the preamble, amend part 18 of title 29 of the Code of Federal Regulations as follows:

### **PART 18—RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE HEARINGS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES.**

1. The authority citation for part 18 continues to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 551-553; 5 U.S.C. 571 note; E.O. 12778; 57 FR 7292.

2. Revise subpart A to read as follows:

#### **Subpart A—General**

Sec.

#### **GENERAL PROVISIONS**

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18.11 Definitions.

- 18.12 Proceedings before administrative law judge.
- 18.13 Settlement judge procedure.
- 18.14 Ex parte communication.
- 18.15 Substitution of administrative law judge.
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#### PARTIES AND REPRESENTATIVES

- 18.20 Parties to a proceeding.
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- 18.23 Disqualification of representatives.
- 18.24 Briefs from amicus curiae.

#### SERVICE, FORMAT, AND TIMING OF FILINGS AND OTHER PAPERS

- 18.30 Service and filing.
- 18.31 Privacy protection for filings and exhibits.
- 18.32 Computing and extending time.
- 18.33 Motions and other papers.
- 18.34 Format of papers filed.
- 18.35 Signing motions and other papers; representations to the judge; sanctions.
- 18.36 Amendments after referral to the Office of Administrative Law Judges.

#### PREHEARING PROCEDURE

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- 18.41 Continuances and changes in place of hearing.
- 18.42 Expedited proceedings.
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#### DISCLOSURE AND DISCOVERY

- 18.50 General provisions governing disclosure and discovery.
- 18.51 Discovery scope and limits.
- 18.52 Protective orders.
- 18.53 Supplementing disclosures and responses.
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- 18.56 Subpoena.
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#### TYPES OF DISCOVERY

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- 18.61 Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.
- 18.62 Physical and mental examinations.
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#### DISPOSITION WITHOUT HEARING

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#### HEARING

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- 18.81 Formal hearing.
- 18.82 Exhibits.
- 18.83 Stipulations.
- 18.84 Official notice.
- 18.85 Privileged, sensitive, or classified material.
- 18.86 Hearing room conduct.
- 18.87 Standards of conduct.
- 18.88 Transcript of proceedings.

#### POST HEARING

- 18.90 Closing the record; subsequent motions.
- 18.91 Post-hearing brief.
- 18.92 Decision and order.
- 18.93 Motion for reconsideration.
- 18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.
- 18.95 Review of decision

#### GENERAL PROVISIONS

##### **§ 18.10 Scope and purpose.**

(a) In general. These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every

proceeding. To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

(b) Type of proceeding. Unless the governing statute, regulation, or executive order prescribes a different procedure, proceedings follow the Administrative Procedure Act, 5 U.S.C. 551 through 559.

(c) Waiver, modification, and suspension. Upon notice to all parties, the presiding judge may waive, modify, or suspend any rule under this subpart when doing so will not prejudice a party and will serve the ends of justice.

#### **§ 18.11 Definitions.**

For purposes of these rules, these definitions supplement the definitions in the Administrative Procedure Act, 5 U.S.C. 551.

Calendar call means a meeting in which the judge calls cases awaiting hearings, determines case status, and assigns a hearing date and time.

Chief Judge means the Chief Administrative Law Judge of the United States Department of Labor Office of Administrative Law Judges and judges to whom the Chief Judge delegates authority.

Docket clerk means the Chief Docket Clerk at the Office of Administrative Law Judges in Washington, DC. But once a case is assigned to a judge in a district office, docket clerk means the docket staff in that office.

Hearing means that part of a proceeding consisting of a session to decide issues of fact or law that is recorded and transcribed and provides the opportunity to present evidence or argument.

Judge means an administrative law judge appointed under the provisions of 5 U.S.C. 3105.

Order means the judge's disposition of one or more procedural or substantive issues, or of the entire matter.

Proceeding means an action before the Office of Administrative Law Judges that creates a record leading to an adjudication or order.

Representative means any person permitted to represent another in a proceeding before the Office of Administrative Law Judges.

**§ 18.12 Proceedings before administrative law judge.**

(a) Designation. The Chief Judge designates the presiding judge for all proceedings.

(b) Authority. In all proceedings under this part, the judge has all powers necessary to conduct fair and impartial proceedings, including those described in the Administrative Procedure Act, 5 U.S.C. 556. Among them is the power to:

- (1) Regulate the course of proceedings in accordance with applicable statute, regulation or executive order;
- (2) Administer oaths and affirmations and examine witnesses;
- (3) Compel the production of documents and appearance of witnesses within a party's control;
- (4) Issue subpoenas authorized by law;
- (5) Rule on offers of proof and receive relevant evidence;



- (6) Dispose of procedural requests and similar matters;
- (7) Terminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order;
- (8) Issue decisions and orders;
- (9) Exercise powers vested in the Secretary of Labor that relate to proceedings before the Office of Administrative Law Judges; and
- (10) Where applicable take any appropriate action authorized by the FRCP.

**§ 18.13 Settlement judge procedure.**

(a) How initiated. The Office of Administrative Law Judges provides settlement judges to aid the parties in resolving the matter that is the subject of the controversy. Upon a joint request by the parties or upon referral by the judge when no party objects, the Chief Judge may appoint a settlement judge. A settlement judge will not be appointed when settlement proceedings would be inconsistent with a statute, regulation, or executive order.

(b) Appointment. The Chief Judge has discretion to appoint a settlement judge, who must be an active or retired judge. The settlement judge will not be appointed to hear and decide the case or approve the settlement without the parties' consent and the approval of the Chief Judge.

(c) Duration of settlement proceeding. Unless the Chief Judge directs otherwise, settlement negotiations under this section must be completed within 60 days from the date of the settlement judge's appointment. The settlement judge may request that the Chief Judge extend the appointment. The negotiations will be terminated if a party

withdraws from participation, or if the settlement judge determines that further negotiations would be unproductive or inappropriate.

(d) Powers of the settlement judge. The settlement judge may convene settlement conferences; require the parties or their representatives to attend with full authority to settle any disputes; and impose other reasonable requirements to expedite an amicable resolution of the case.

(e) Stay of proceedings before presiding judge. The appointment of a settlement judge does not stay any aspect of the proceeding before the presiding judge. Any motion to stay must be directed to the presiding judge.

(f) Settlement conferences. Settlement conferences may be conducted by telephone, videoconference or in person at the discretion of the settlement judge after considering the nature of the case, location of the participants, availability of technology, and efficiency of administration.

(g) Confidentiality. All discussions with the settlement judge are confidential; none may be recorded or transcribed. The settlement judge must not disclose any confidential communications made during settlement proceedings, except as required by statute, executive order, or court order. The settlement judge may not be subpoenaed or called as a witness in any hearing of the case or any subsequent administrative proceedings before the Department to testify to statements made or conduct during the settlement discussions.

(h) Report. The parties must promptly inform the presiding judge of the outcome of the settlement negotiations. If a settlement is reached, the parties must submit the required

documents to the presiding judge within 14 days of the conclusion of settlement discussions unless the presiding judge orders otherwise.

(i) Non-reviewable decisions. Whether a settlement judge should be appointed, the selection of a particular settlement judge, and the termination of proceedings under this section are matters not subject to review by Department officials.

**§ 18.14 Ex parte communication.**

The parties, their representatives, or other interested persons must not engage in ex parte communications on the merits of a case with the judge.

**§ 18.15 Substitution of administrative law judge.**

(a) Substitution during hearing. If the judge is unable to complete a hearing, a successor judge designated pursuant to §18.12 may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. The successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

(b) Substitution following hearing. If the judge is unable to proceed after the hearing is concluded, the successor judge appointed pursuant to §18.12 may issue a decision and order based upon the existing record after notifying the parties and giving them an opportunity to respond. Within 14 days of receipt of the judge's notice, a party may file an objection to the judge issuing a decision based on the existing record. If no objection is filed, the objection is considered waived. Upon good cause shown, the judge may order supplemental proceedings.

**§ 18.16 Disqualification.**

(a) Disqualification on judge's initiative. A judge must withdraw from a proceeding whenever he or she considers himself or herself disqualified.

(b) Request for disqualification. A party may file a motion to disqualify the judge. The motion must allege grounds for disqualification, and include any appropriate supporting affidavits, declarations or other documents. The presiding judge must rule on the motion in a written order that states the grounds for the ruling.

**§ 18.17 Legal assistance.**

The Office of Administrative Law Judges does not appoint representatives, refer parties to representatives, or provide legal assistance.

**PARTIES AND REPRESENTATIVES**

**§ 18.20 Parties to a proceeding.**

A party seeking original relief or action is designated a complainant, claimant or plaintiff, as appropriate. A party against whom relief or other action is sought is designated a respondent or defendant, as appropriate. When participating in a proceeding, the applicable Department of Labor's agency is a party or party-in-interest.

**§ 18.21 Party appearance and participation.**

(a) In general. A party may appear and participate in the proceeding in person or through a representative.

(b) Waiver of participation. By filing notice with the judge, a party may waive the right to participate in the hearing or the entire proceeding. When all parties waive the right to participate in the hearing, the judge may issue a decision and order based on the pleadings, evidence, and briefs.

(c) Failure to appear. When a party has not waived the right to participate in a hearing, conference or proceeding but fails to appear at a scheduled hearing or conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear.

**§ 18.22 Representatives.**

(a) Notice of appearance. When first making an appearance, each representative must file a notice of appearance that indicates on whose behalf the appearance is made and the proceeding name and docket number. Any attorney representative must include in the notice of appearance the license registration number(s) assigned to the attorney.

(b) Categories of representation; admission standards—(1) Attorney representative.

Under these rules, “attorney” or “attorney representative” means an individual who has been admitted to the bar of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia.

(i) Attorney in good standing. An attorney who is in good standing in his or her licensing jurisdiction may represent a party or subpoenaed witness before the Office of Administrative Law Judges. The filing of the Notice of Appearance required in paragraph (a) of this section constitutes an attestation that:

(A) The attorney is a member of a bar in good standing of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia where the attorney has been licensed to practice law; and

(B) No disciplinary proceeding is pending against the attorney in any jurisdiction where the attorney is licensed to practice law.

(ii) Attorney not in good standing. An attorney who is not in good standing in his or her licensing jurisdiction may not represent a party or subpoenaed witness before the Office of Administrative Law Judges, unless he or she obtains the judge's approval. Such an attorney must file a written statement that establishes why the failure to maintain good standing is not disqualifying. The judge may deny approval for the appearance of such an attorney after providing notice and an opportunity to be heard.

(iii) Disclosure of discipline. An attorney representative must promptly disclose to the judge any action suspending, enjoining, restraining, disbarring, or otherwise currently restricting the attorney in the practice of law in any jurisdiction where the attorney is licensed to practice law.

(2) Non-attorney representative. An individual who is not an attorney as defined by paragraph (b)(1) of this section may represent a party or subpoenaed witness upon the judge's approval. The individual must file a written request to serve as a non-attorney representative that sets forth the name of the party or subpoenaed witness represented and certifies that the party or subpoenaed witness desires the representation. The judge may require that the representative establish that he or she is subject to the laws of the United States and possesses communication skills, knowledge, character, thoroughness and preparation reasonably necessary to render appropriate assistance. The judge may inquire as to the qualification or

ability of a non-attorney representative to render assistance at any time. The judge may deny the request to serve as non-attorney representative after providing the party or subpoenaed witness with notice and an opportunity to be heard.

(c) Duties. A representative must be diligent, prompt, and forthright when dealing with parties, representatives and the judge, and act in a manner that furthers the efficient, fair and orderly conduct of the proceeding. An attorney representative must adhere to the applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice.

(d) Prohibited actions. A representative must not:

- (1) Threaten, coerce, intimidate, deceive or knowingly mislead a party, representative, witness, potential witness, judge, or anyone participating in the proceeding regarding any matter related to the proceeding;
- (2) Knowingly make or present false or misleading statements, assertions or representations about a material fact or law related to the proceeding;
- (3) Unreasonably delay, or cause to be delayed without good cause, any proceeding; or
- (4) Engage in any other action or behavior prejudicial to the fair and orderly conduct of the proceeding.

(e) Withdrawal of appearance. A representative who desires to withdraw after filing a notice of appearance or a party desiring to withdraw the appearance of a representative must file a motion with the judge. The motion must state that notice of the withdrawal has been given to the party, client or representative. The judge may deny a

representative's motion to withdraw when necessary to avoid undue delay or prejudice to the rights of a party.

**§ 18.23 Disqualification of representatives.**

(a) Disqualification—(1) Grounds for disqualification. Representatives qualified under §18.22 may be disqualified for:

(i) Suspension of a license to practice law or disbarment from the practice of law by any court or agency of the United States, highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia;

(ii) Disbarment from the practice of law on consent or resignation from the bar of a court or agency while an investigation into an allegation of misconduct is pending; or

(iii) Committing an act, omission, or contumacious conduct that violates these rules, an applicable statute, an applicable regulation, or the judge's order(s).

(2) Disqualification procedure. The Chief Judge must provide notice and an opportunity to be heard as to why the representative should not be disqualified from practice before the Office of Administrative Law Judges. The notice will include a copy of the document that provides the grounds for the disqualification. Unless otherwise directed, any response must be filed within 21 days of service of the notice. The Chief Judge's determination must be based on the reliable, probative and substantial evidence of record, including the notice and response.



(b) Notification of disqualification action. When an attorney representative is disqualified, the Chief Judge will notify the jurisdiction(s) in which the attorney is licensed to practice and the National Lawyer Regulatory Data Bank maintained by the American Bar Association Standing Committee on Professional Discipline, by providing a copy of the decision and order.

(c) Application for reinstatement. A representative disqualified under this section may be reinstated by the Chief Judge upon application. At the discretion of the Chief Judge, consideration of an application for reinstatement may be limited to written submissions or may be referred for further proceedings before the Chief Judge.

**§ 18.24 Briefs from amicus curiae.**

The United States or an officer or agency thereof, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus brief without the consent of the parties or leave of the judge. Any other amicus curiae may file a brief only by leave of the judge, upon the judge's request, or if the brief states that all parties have consented to its filing. A request for leave to file an amicus brief must be made by written motion that states the interest of the movant in the proceeding. The deadline for submission of an amicus brief will be set by the presiding judge.

**SERVICE, FORMAT, AND TIMING OF FILINGS AND OTHER PAPERS**

**§ 18.30 Service and filing.**

(a) Service on parties—(1) In general. Unless these rules provide otherwise, all papers filed with OALJ or with the judge must be served on every party.

(2) Service: how made—(i) Serving a party's representative. If a party is represented, service under this section must be made on the representative. The judge also may order service on the party.

(ii) Service in general. A paper is served under this section by:

(A) Handing it to the person;

(B) Leaving it;

(1) At the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(2) If the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there.

(C) Mailing it to the person's last known address—in which event service is complete upon mailing;

(D) Leaving it with the docket clerk if the person has no known address;

(E) Sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) Delivering it by any other means that the person consented to in writing—in which event service is complete when the person

making service delivers it to the agency designated to make delivery.

(3) Certificate of service. A certificate of service is a signed written statement that the paper was served on all parties. The statement must include:

- (i) The title of the document;
- (ii) The name and address of each person or representative being served;
- (iii) The name of the party filing the paper and the party's representative, if any;
- (iv) The date of service; and
- (v) How the paper was served.

(b) Filing with Office of Administrative Law Judges—(1) Required filings. Any paper that is required to be served must be filed within a reasonable time after service with a certificate of service. But disclosures under §18.50(c) and the following discovery requests and responses must not be filed until they are used in the proceeding or the judge orders filing:

- (i) Notices of deposition,
- (ii) Depositions,
- (iii) Interrogatories,
- (iv) Requests for documents or tangible things or to permit entry onto land;
- (v) Requests for admission, and

(vi) The notice (and the related copy of the subpoena) that must be served on the parties under rule 18.56(b)(1) before a “documents only” subpoena may be served on the person commended to produce the material.

(2) Filing: when made—in general. A paper is filed when received by the docket clerk or the judge during a hearing.

(3) Filing how made. A paper may be filed by mail, courier service, hand delivery, facsimile or electronic delivery.

(i) Filing by facsimile—(A) When permitted. A party may file by facsimile only as directed or permitted by the judge. If a party cannot obtain prior permission because the judge is unavailable, a party may file by facsimile up to 12 pages, including a statement of the circumstances precluding filing by delivery or mail. Based on the statement, the judge may later accept the document as properly filed at the time transmitted.

(B) Cover sheet. Filings by facsimile must include a cover sheet that identifies the sender, the total number of pages transmitted, and the matter’s docket number and the document’s title.

(C) Retention of the original document. The original signed document will not be substituted into the record unless required by law or the judge.

(ii) Any party filing a facsimile of a document must maintain the original document and transmission record until the case is final. A transmission record is a paper printed by the transmitting facsimile machine that states the telephone number of the receiving machine, the number of pages sent,

the transmission time and an indication that no error in transmission occurred.

(iii) Upon a party's request or judge's order, the filing party must provide for review the original transmitted document from which the facsimile was produced.

(4) Electronic filing, signing, or verification. A judge may allow papers to be filed, signed, or verified by electronic means.

**§ 18.31 Privacy protection for filings and exhibits.**

(a) Redacted filings and exhibits. Unless the judge orders otherwise, in an electronic or paper filing or exhibit that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, the party or nonparty making the filing must redact all such information, except:

- (1) The last four digits of the social-security number and taxpayer-identification number;
- (2) The year of the individual's birth;
- (3) The minor's initials; and
- (4) The last four digits of the financial-account number.

(b) Exemptions from the redaction requirement. The redaction requirement does not apply to the following:

- (1) The record of an administrative or agency proceeding;
- (2) The official record of a state-court proceeding;

(3) The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; and

(4) A filing or exhibit covered by paragraph (c) of this section.

(c) Option for filing a reference list. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The reference list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(d) Waiver of protection of identifiers. A person waives the protection of paragraph (a) of this section as to the person's own information by filing or offering it without redaction and not under seal.

(e) Protection of material. For good cause, the judge may order protection of material pursuant to §§18.85 and 18.52.

### **§ 18.32 Computing and extending time.**

(a) Computing time. The following rules apply in computing any time period specified in these rules, a judge's order, or in any statute, regulation, or executive order that does not specify a method of computing time.

(1) When the period is stated in days or a longer unit of time:

(i) Exclude the day of the event that triggers the period;

(ii) Count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(iii) Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) “Last day” defined. Unless a different time is set by a statute, regulation, executive order, or judge’s order, the “last day” ends at 4:30 p.m. local time where the event is to occur.

(3) “Next day” defined. The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(4) “Legal holiday” defined. “Legal holiday” means the day set aside by statute for observing New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and any day on which the district office in which the document is to be filed is closed or otherwise inaccessible.

(b) Extending time. When an act may or must be done within a specified time, the judge may, for good cause, extend the time:

(1) With or without motion or notice if the judge acts, or if a request is made, before the original time or its extension expires; or

(2) On motion made after the time has expired if the party failed to act because of excusable neglect.

(c) Additional time after certain kinds of service. When a party may or must act within a specified time after service and service is made under §18.30(a)(2)(B)(iii) or (iv), 3 days are added after the period would otherwise expire under paragraph (a) of this section.

**§ 18.33 Motions and other papers.**

(a) In general. A request for an order must be made by motion. The motion must:

- (1) Be in writing, unless made during a hearing;
- (2) State with particularity the grounds for seeking the order;
- (3) State the relief sought;
- (4) Unless the relief sought has been agreed to by all parties, be accompanied by affidavits, declarations, or other evidence; and
- (5) If required by paragraph (c)(4) of this section, include a memorandum of points and authority supporting the movant's position.

(b) Form. The rules governing captions and other matters of form apply to motions and other requests.

(c) Written motion before hearing. (1) A written motion before a hearing must be served with supporting papers, at least 21 days before the time specified for the hearing, with the following exceptions:

- (i) When the motion may be heard ex parte;
- (ii) When these rules or an appropriate statute, regulation, or executive order set a different time; or
- (iii) When an order sets a different time.



(2) A written motion served within 21 days before the hearing must state why the motion was not made earlier.

(3) A written motion before hearing must state that counsel conferred, or attempted to confer, with opposing counsel in a good faith effort to resolve the motion's subject matter, and whether the motion is opposed or unopposed. A statement of consultation is not required with pro se litigants or with the following motions:

(i) To dismiss;

(ii) For summary decision; and

(iii) Any motion filed as "joint," "agreed," or "unopposed."

(4) Unless the motion is unopposed, the supporting papers must include affidavits, declarations or other proof to establish the factual basis for the relief. For a dispositive motion and a motion relating to discovery, a memorandum of points and authority must also be submitted. A judge may direct the parties file additional documents in support of any motion.

(d) Opposition or other response to a motion filed prior to hearing. A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.

(e) A motions made at hearing. A motion made at a hearing may be stated orally unless the judge determines that a written motion or response would best serve the ends of justice.

(f) Renewed or repeated motions. A motion seeking the same or substantially similar relief previously denied, in whole or in part, must include the following information:

- (1) The earlier motion(s),
- (2) When the respective motion was made,
- (3) The judge to whom the motion was made,
- (4) The earlier ruling(s), and
- (5) The basis for the current motion.

(g) Motion hearing. The judge may order a hearing to take evidence or oral argument on a motion.

#### **§ 18.34 Format of papers filed.**

Every paper filed must be printed in black ink on 8.5 x 11-inch opaque white paper and begin with a caption that includes:

- (a) The parties' names,
- (b) A title that describes the paper's purpose, and
- (c) The docket number assigned by the Office of Administrative Law Judges. If the Office has not assigned a docket number, the paper must bear the case number assigned by the Department of Labor agency where the matter originated. If the case number is an individual's Social Security number then only the last four digits may be used. See §18.31(a)(1).

#### **§ 18.35 Signing motions and other papers; representations to the judge; sanctions.**

(a) Date and signature. Every written motion and other paper filed with OALJ must be dated and signed by at least one representative of record in the representative's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, telephone number, facsimile number and e-mail address, if any. The judge must strike an unsigned paper unless the omission is promptly corrected after being called to the representative's or party's attention.

(b) Representations to the judge. By presenting to the judge a written motion or other paper—whether by signing, filing, submitting, or later advocating it—the representative or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) It is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceedings;

(2) The claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) The factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions—(1) In general. If, after notice and a reasonable opportunity to respond, the judge determines that paragraph (b) of this section has been violated, the judge may impose an appropriate sanction on any representative, law firm, or party that violated the

rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates paragraph (b) of this section. The motion must be served under §18.30(a), but it must not be filed or be presented to the judge if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the judge sets.

(3) On the judge's initiative. On his or her own, the judge may order a representative, law firm, or party to show cause why conduct specifically described in the order has not violated paragraph (b) of this section.

(4) Nature of a sanction. A sanction imposed under this section may include, but is not limited to, striking part or all of the offending document, forbidding the filing of any further documents, excluding related evidence, admonishment, referral of counsel misconduct to the appropriate licensing authority, and including the sanctioned activity in assessing the quality of representation when determining an appropriate hourly rate and billable hours when adjudicating attorney fees.

(5) Requirements for an order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to discovery. This section does not apply to disclosures and discovery requests, responses, objections, and motions under §§18.50 through 18.65.

**§ 18.36 Amendments after referral to the Office of Administrative Law Judges.**

The judge may allow parties to amend and supplement their filings.

**PREHEARING PROCEDURE**

**§ 18.40 Notice of hearing.**

(a) In general. Except when the hearing is scheduled by calendar call, the judge must notify the parties of the hearing's date, time, and place at least 14 days before the hearing.

The notice is sent by regular, first-class mail, unless the judge determines that circumstances require service by certified mail or other means. The parties may agree to waive the 14-day notice for the hearing.

(b) Date, time, and place. The judge must consider the convenience and necessity of the parties and the witnesses in selecting the date, time, and place of the hearing.

**§ 18.41 Continuances and changes in place of hearing.**

(a) By the judge. Upon reasonable notice to the parties, the judge may change the time, date, and place of the hearing.

(b) By a party's motion. A request by a party to continue a hearing or to change the place of the hearing must be made by motion.

(1) Continuances. A motion for continuance must be filed promptly after the party becomes aware of the circumstances supporting the continuance. In exceptional circumstances, a party may orally request a continuance and must immediately notify the other parties of the continuance request.

(2) Change in place of hearing. A motion to change the place of a hearing must be filed promptly.

**§ 18.42 Expedited proceedings.**

A party may move to expedite the proceeding. The motion must demonstrate the specific harm that would result if the proceeding is not expedited. If the motion is granted, the formal hearing ordinarily will not be scheduled with less than 7 days notice to the parties, unless all parties consent to an earlier hearing.

**§ 18.43 Consolidation; separate hearings.**

(a) Consolidation. If separate proceedings before the Office of the Administrative Law Judges involve a common question of law or fact, a judge may:

- (1) Join for hearing any or all matters at issue in the proceedings;
- (2) Consolidate the proceedings; or
- (3) Issue any other orders to avoid unnecessary cost or delay.

(b) Separate hearings. For convenience, to avoid prejudice, or to expedite and economize, the judge may order a separate hearing of one or more issues.

**§ 18.44 Prehearing conference.**

(a) In general. The judge, with or without a motion, may order one or more prehearing conferences for such purposes as:

- (1) Expediting disposition of the proceeding;
- (2) Establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) Discouraging wasteful prehearing activities;
- (4) Improving the quality of the hearing through more thorough preparation; and
- (5) Facilitating settlement.

(b) Scheduling. Prehearing conferences may be conducted in person, by telephone, or other means after reasonable notice of time, place and manner of conference has been given.

(c) Participation. All parties must participate in prehearing conferences as directed by the judge. A represented party must authorize at least one of its attorneys or representatives to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at the prehearing conference, including possible settlement.

(d) Matters for consideration. At the conference, the judge may consider and take appropriate actions on the following matters:

- (1) Formulating and simplifying the issues, and eliminating frivolous claims or defenses;
- (2) Amending the papers that had framed the issues before the matter was referred for hearing;
- (3) Obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;
- (4) Avoiding unnecessary proof and cumulative evidence, and limiting the number of expert or other witnesses;
- (5) Determining the appropriateness and timing of dispositive motions under §§18.70 and 18.72;
- (6) Controlling and scheduling discovery, including orders affecting disclosures and discovery under §§18.50 through 18.65;

(7) Identifying witnesses and documents, scheduling the filing and exchange of any exhibits and prehearing submissions, and setting dates for further conferences and for the hearing;

(8) Referring matters to a special master;

(9) Settling the case and using special procedures to assist in resolving the dispute such as the settlement judge procedure under §18.13, private mediation, and other means authorized by statute or regulation;

(10) Determining the form and content of prehearing orders;

(11) Disposing of pending motions;

(12) Adopting special procedures for managing potentially difficult or protracted proceedings that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) Consolidating or ordering separate hearings under §18.43;

(14) Ordering the presentation of evidence early in the proceeding on a manageable issue that might, on the evidence, be the basis for disposing of the proceeding;

(15) Establishing a reasonable limit on the time allowed to present evidence; and

(16) Facilitating in other ways the just, speedy, and inexpensive disposition of the proceeding.

(e) Reporting. The judge may direct that the prehearing conference be recorded and transcribed. If the conference is not recorded, the judge should summarize the conference proceedings on the record at the hearing or by separate prehearing notice or order.



## DISCLOSURE AND DISCOVERY

### § 18.50 General provisions governing disclosure and discovery.

(a) Timing and sequence of discovery—(1) Timing. A party may seek discovery at any time after a judge issues an initial notice or order. But if the judge orders the parties to confer under paragraph (b) of this section:

(i) The time to respond to any pending discovery requests is extended until the time agreed in the discovery plan, or that the judge sets in resolving disputes about the discovery plan, and

(ii) No party may seek additional discovery from any source before the parties have conferred as required by paragraph (b) of this section, except by stipulation.

(2) Sequence. Unless, on motion, the judge orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(i) Methods of discovery may be used in any sequence; and

(ii) Discovery by one party does not require any other party to delay its discovery.

(b) Conference of the parties; planning for discovery—(1) In general. The judge may order the parties to confer on the matters described in paragraphs (b)(2) and (3) of this section.

(2) Conference content; parties' responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by paragraph (c) of this section; discuss any issues about preserving

discoverable information; and develop a proposed discovery plan. The representatives of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the judge within 14 days after the conference a written report outlining the plan. The judge may order the parties or representatives to attend the conference in person.

(3) Discovery plan. A discovery plan must state the parties' views and proposals on:

- (i) What changes should be made in the timing, form, or requirement for disclosures under paragraph (c) of this section, including a statement of when initial disclosures were made or will be made;
- (ii) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
- (iii) Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- (iv) Any issues about claims of privilege or of protection as hearing-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the judge to include their agreement in an order;
- (v) What changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed; and
- (vi) Any other orders that the judge should issue under §18.52 or § 18.44.

(c) Required disclosures—(1) Initial disclosure—(i) In general. Except as exempted by paragraph (c)(1)(ii) of this section or otherwise ordered by the judge, a party must, without awaiting a discovery request, provide to the other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(B) A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and

(C) A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under §18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

(ii) Proceedings exempt from initial disclosure. The following proceedings are exempt from initial disclosure:

- (A) A proceeding under 29 CFR part 20 for review of an agency determination regarding the existence or amount of a debt, or the repayment schedule proposed by the agency;
- (B) A proceeding before the Board of Alien Labor Certification Appeals under the Immigration and Nationality Act; and
- (C) A proceeding under the regulations governing certification of H-2 non-immigrant temporary agricultural employment at 20 CFR part 655, subpart B ;
- (D) A rulemaking proceeding under the Occupational Safety and Health Act of 1970; and
- (E) A proceeding for civil penalty assessments under Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132.

(iii) Parties exempt from initial disclosure. The following parties are exempt from initial disclosure:

- (A) In a Black Lung benefits proceeding under 30 U.S.C. 901 et seq., the representative of the Office of Workers' Compensation Programs of the Department of Labor, if an employer has been identified as the Responsible Operator and is a party to the proceeding, see 20 CFR 725.418(d); and
- (B) In a proceeding under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, or an associated statute such as the Defense Base Act, 42 U.S.C.

1651-1654, the representative of the Office of Workers' Compensation Programs of the Department of Labor, unless the Solicitor of Labor or the Solicitor's designee has elected to participate in the proceeding under 20 CFR 702.333(b), or unless an employer or carrier has applied for relief under the special fund, as defined in 33 U.S.C. 908(f).

(iv) Time for initial disclosures—in general. A party must make the initial disclosures required by paragraph (c)(1)(i) of this section within 21 days after an initial notice or order is entered acknowledging that the proceeding has been docketed at the OALJ unless a different time is set by stipulation or a judge's order, or a party objects during the conference that initial disclosures are not appropriate in the proceeding and states the objection in the proposed discovery plan. In ruling on the objection, the judge must determine what disclosures, if any, are to be made and must set the time for disclosure.

(v) Time for initial disclosures—for parties served or joined later. A party that is first served or otherwise joined later in the proceeding must make the initial disclosures within 21 days after being served or joined, unless a different time is set by stipulation or the judge's order. Copies of all prior disclosures must be served on a newly served or joined party within 21 days of the service or joinder.

(vi) Basis for initial disclosure; unacceptable excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of expert testimony—(i) In general. A party must disclose to the other parties the identity of any witness who may testify at hearing, either live or by deposition. The judge should set the time for the disclosure by prehearing order.

(ii) Witnesses who must provide a written report. Unless otherwise stipulated or ordered by the judge, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (A) A complete statement of all opinions the witness will express and the basis and reasons for them;
- (B) The facts or data considered by the witness in forming them;
- (C) Any exhibits that will be used to summarize or support them;
- (D) The witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial, a hearing, or by deposition; and

(F) A statement of the compensation to be paid for the study and testimony in the case.

(iii) Witnesses who do not provide a written report. Unless otherwise stipulated or ordered by the judge that the witness is not required to provide a written report, this disclosure must state:

(A) The subject matter on which the witness is expected to present expert opinion evidence; and

(B) A summary of the facts and opinions to which the witness is expected to testify.

(iv) Supplementing the disclosure. The parties must supplement these disclosures when required under §18.53.

(3) Prehearing disclosures. In addition to the disclosures required by paragraphs (c)(1) and (2) of this section, a party must provide to the other parties and promptly file the prehearing disclosures described in §18.80.

(4) Form of disclosures. Unless the judge orders otherwise, all disclosures under this paragraph (c) must be in writing, signed, and served.

(d) Signing disclosures and discovery requests, responses, and objections—(1) Signature required; effect of signature. Every disclosure under paragraph (c) of this section and every discovery request, response, or objection must be signed by at least one of the party's representatives in the representative's own name, or by the party personally if

unrepresented, and must state the signer's address, telephone number, facsimile number, and e-mail address, if any. By signing, a representative or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(i) With respect to a disclosure, it is complete and correct as of the time it is made; and

(ii) With respect to a discovery request, response, or objection, it is:

(A) Consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(B) Not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(C) Neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the judge must strike it unless a signature is promptly supplied after the omission is called to the representative's or party's attention.

(3) Sanction for improper certification. If a certification violates this section without substantial justification, the judge, on motion or on his or her own, must



impose an appropriate sanction, as provided in §18.57, on the signer, the party on whose behalf the signer was acting, or both.

**§ 18.51 Discovery scope and limits.**

(a) Scope in general. Unless otherwise limited by a judge's order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the judge may order discovery of any matter relevant to the subject matter involved in the proceeding. Relevant information need not be admissible at the hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by paragraph (b)(4) of this section.

(b) Limitations on frequency and extent—(1) When permitted. By order, the judge may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under §18.64. The judge's order may also limit the number of requests under §18.63.

(2) Specific limitations on electronically stored information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the judge may nonetheless order discovery from such sources if the requesting party shows good

cause, considering the limitations of paragraph (b)(4) of this section. The judge may specify conditions for the discovery.

(3) Inadvertently disclosed privileged or protected information. By requesting electronically stored information, a party consents to the application of Federal Rule of Evidence 502 with regard to inadvertently disclosed privileged or protected information.

(4) When required. On motion or on his or her own, the judge must limit the frequency or extent of discovery otherwise allowed by these rules when:

- (i) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(c) Hearing preparation: materials—(1) Documents and tangible things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for hearing by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to paragraph (d) of this section, those materials may be discovered if:

(i) They are otherwise discoverable under paragraph (a) of this section;  
and

(ii) The party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(2) Protection against disclosure. A judge who orders discovery of those materials must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's representative concerning the litigation.

(3) Previous statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a judge's order. A previous statement is either:

(i) A written statement that the person has signed or otherwise adopted or approved; or

(ii) A contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(d) Hearing preparation: experts—(1) Deposition of an expert who may testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If §18.50(c)(2)(B) requires a report from the expert the deposition may be conducted only after the report is provided, unless the parties stipulate otherwise.

(2) Hearing-preparation protection for draft reports or disclosures. Paragraphs (c)(1) and (2) of this section protect drafts of any report or disclosure required under §18.50(c)(2), regardless of the form in which the draft is recorded.

(3) Hearing-preparation protection for communications between a party's representative and expert witnesses. Paragraphs (c)(1) and (2) under this section protect communications between the party's representative and any witness required to provide a report under §18.50(c)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) Relate to compensation for the expert's study or testimony;
- (ii) Identify facts or data that the party's representative provided and that the expert considered in forming the opinions to be expressed; or
- (iii) Identify assumptions that the party's representative provided and that the expert relied on in forming the opinions to be expressed.

(4) Expert employed only for hearing preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for hearing and whose testimony is not anticipated to be used at the hearing. But a party may do so only:

- (i) As provided in §18.62(c); or
- (ii) On showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(e) Claiming privilege or protecting hearing-preparation materials—(1) Information withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as hearing-preparation material, the party must:

- (i) Expressly make the claim; and
- (ii) Describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(2) Information produced. If information produced in discovery is subject to a claim of privilege or of protection as hearing-preparation material, the party making the claim must notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge for an in camera determination of the claim. The producing party must preserve the information until the claim is resolved.

**§ 18.52 Protective orders.**

(a) In general. A party or any person from whom discovery is sought may file a written motion for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort

to resolve the dispute without the judge's action. The judge may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) Forbidding the disclosure or discovery;
- (2) Specifying terms, including time and place, for the disclosure or discovery;
- (3) Prescribing a discovery method other than the one selected by the party seeking discovery;
- (4) Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (5) Designating the persons who may be present while the discovery is conducted;
- (6) Requiring that a deposition be sealed and opened only on the judge's order;
- (7) Requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (8) Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the judge directs.

(b) Ordering discovery. If a motion for a protective order is wholly or partly denied, the judge may, on just terms, order that any party or person provide or permit discovery.

**§ 18.53 Supplementing disclosures and responses.**

(a) In general. A party who has made a disclosure under §18.50(c)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(1) In a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(2) As ordered by the judge.

(b) Expert witness. For an expert whose report must be disclosed under §18.50(c)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's prehearing disclosures under §18.50(c)(3) are due.

**§ 18.54 Stipulations about discovery procedure.**

Unless the judge orders otherwise, the parties may stipulate that:

(a) A deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(b) Other procedures governing or limiting discovery be modified— but a stipulation extending the time for any form of discovery must have the judge's approval if it would interfere with the time set for completing discovery, for hearing a motion, or for hearing.

**§ 18.55 Using depositions at hearings.**

(a) Using depositions—(1) In general. If there is no objection, all or part of a deposition may be used at a hearing to the extent it would be admissible under the applicable rules of evidence as if the deponent were present and testifying.

(2) Over objection. Notwithstanding any objection, all or part of a deposition may be used at a hearing against a party on these conditions:

- (i) The party was present or represented at the taking of the deposition or had reasonable notice of it;
- (ii) It is used to the extent it would be admissible under the applicable rules of evidence if the deponent were present and testifying; and
- (iii) The use is allowed by paragraphs (a)(3) through (9) of this section.

(3) Impeachment and other uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the applicable rules of evidence.

(4) Deposition of party, agent, or designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under § 18.64(b)(6) or § 18.65(a)(4).

(5) Deposition of expert, treating physician, or examining physician. A party may use for any purpose the deposition of an expert witness, treating physician or examining physician.

(6) Unavailable witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the judge finds:

- (i) That the witness is dead;
- (ii) That the witness is more than 100 miles from the place of hearing or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;



(iii) That the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(iv) That the party offering the deposition could not procure the witness's attendance by subpoena; or

(v) on motion and notice, that exceptional circumstances make it desirable—in the interests of justice and with due regard to the importance of live testimony in an open hearing—to permit the deposition to be used.

(7) Limitations on use—(i) Deposition taken on short notice. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under §18.52(a)(2) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(ii) Unavailable deponent; party could not obtain a representative. A deposition taken without leave of the judge under the unavailability provision of §18.64(a)(2)(i)(C) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain a representative to represent it at the deposition.

(8) Using part of a deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(9) Deposition taken in an earlier action. A deposition lawfully taken may be used in a later action involving the same subject matter between the same parties,

or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the applicable rules of evidence.

(b) Objections to admissibility. Subject to paragraph (d)(3) of this section, an objection may be made at a hearing to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of presentation. Unless the judge orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but the judge may receive the testimony in nontranscript form as well.

(d) Waiver of objections—(1) To the notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) To the officer's qualification. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(i) Before the deposition begins; or

(ii) Promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the taking of the deposition—(i) Objection to competence, relevance, or materiality. An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(ii) Objection to an error or irregularity. An objection to an error or irregularity at an oral examination is waived if:

- (A) It relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
- (B) It is not timely made during the deposition.

(iii) Objection to a written question. An objection to the form of a written question under §18.65 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) To completing and returning the deposition. An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

#### **§ 18.56 Subpoena.**

(a) In general. (1) Upon written application of a party the judge may issue a subpoena authorized by statute or law that requires a witness to attend and to produce relevant papers, books, documents, or tangible things in the witness' possession or under the witness' control.

(2) Form and contents—(i) Requirements—in general. Every subpoena must:

(A) State the title of the matter and show the case number assigned by the Office of Administrative Law Judges or the Office of Worker's Compensation Programs. In the event that the case number is an individual's Social Security number only the last four numbers may be used. See §18.31(a)(1);

(B) Bear the signature of the issuing judge;

(C) Command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(D) Set out the text of paragraphs (c) and (d) of this section.

(ii) Command to attend a deposition—notice of the recording method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(iii) Combining or separating a command to produce or to permit inspection; specifying the form for electronically stored information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition or hearing, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(iv) Command to produce; included obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(b) Service—(1) By whom; tendering fees; serving a copy of certain subpoenas. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering with it the fees for 1 day's attendance and the mileage allowed by law. Service may also be made by certified mail with return receipt. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before the formal hearing, then before it is served on the person to whom it is directed, a notice and copy of the subpoena must be served on each party.

(2) Service in the United States. Subject to paragraph (c)(3)(i)(B) of this section, a subpoena may be served at any place within a State, Commonwealth, or Territory of the United States, or the District of Columbia.

(3) Service in a foreign country. 28 U.S.C. 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) Proof of service. Proving service, when necessary, requires filing with the judge a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a person subject to a subpoena—(1) Avoiding undue burden; sanctions. A party or representative responsible for requesting, issuing, or serving a subpoena must take reasonable steps to avoid imposing undue burden on a person subject to the subpoena. The judge must enforce this duty and impose an appropriate sanction.

(2) Command to produce materials or permit inspection—(i) Appearance not required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition or hearing.

(ii) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or representative designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(A) At any time, on notice to the commanded person, the serving party may move the judge for an order compelling production or inspection.

(B) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or modifying a subpoena—(i) When required. On timely motion, the judge must quash or modify a subpoena that:

- (A) Fails to allow a reasonable time to comply;
- (B) Requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to paragraph (c)(3)(ii)(C) of this section, the person may be commanded to attend the formal hearing;
- (C) Requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (D) Subjects a person to undue burden.

(ii) When permitted. To protect a person subject to or otherwise affected by a subpoena, the judge may, on motion, quash or modify the subpoena if it requires:

- (A) Disclosing a trade secret or other confidential research, development, or commercial information;
- (B) Disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or
- (C) A person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend the formal hearing.

(iii) Specifying conditions as an alternative. In the circumstances described in paragraph (c)(3)(ii) of this section, the judge may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(A) Shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(B) Ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in responding to a subpoena—(1) Producing documents or electronically stored information. These procedures apply to producing documents or electronically stored information:

(i) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(ii) Form for producing electronically stored information not specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(iii) Electronically stored information produced in only one form. The person responding need not produce the same electronically stored information in more than one form.



(iv) Inaccessible electronically stored information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the judge may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of §18.51(b)(4)(iii). The judge may specify conditions for the discovery.

(2) Claiming privilege or protection—(i) Information withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as hearing-preparation material must:

(A) Expressly make the claim; and

(B) Describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(ii) Information produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as hearing-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information

until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge in camera for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Failure to obey. When a person fails to obey a subpoena, the party adversely affected by the failure may, when authorized by statute or by law, apply to the appropriate district court to enforce the subpoena.

**§ 18.57 Failure to make disclosures or to cooperate in discovery; sanctions.**

(a) Motion for an order compelling disclosure or discovery—(1) In general. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without the judge's action.

(2) Specific motions—(i) To compel disclosure. If a party fails to make a disclosure required by §18.50(c), any other party may move to compel disclosure and for appropriate sanctions.

(ii) To compel a discovery response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(A) A deponent fails to answer a question asked under §§18.64 and 18.65;

(B) A corporation or other entity fails to make a designation under §§18.64(b)(6) and 18.65(a)(4);

(C) A party fails to answer an interrogatory submitted under §18.60; or

(D) A party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under §18.61.

(iii) Related to a deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(3) Evasive or incomplete disclosure, answer, or response. For purposes of paragraph (a) of this section, an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(b) Failure to comply with a judge's order—(1) For not obeying a discovery order. If a party or a party's officer, director, or managing agent—or a witness designated under §§18.64(b)(6) and 18.65(a)(4)—fails to obey an order to provide or permit discovery, including an order under §18.50(b) or paragraph (a) of this section, the judge may issue further just orders. They may include the following:

(i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;

(ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

- (iii) Striking claims or defenses in whole or in part;
- (iv) Staying further proceedings until the order is obeyed;
- (v) Dismissing the proceeding in whole or in part; or
- (vi) Rendering a default decision and order against the disobedient party;

(2) For not producing a person for examination. If a party fails to comply with an order under §18.62 requiring it to produce another person for examination, the judge may issue any of the orders listed in paragraph (b)(1) of this section, unless the disobedient party shows that it cannot produce the other person.

(c) Failure to disclose, to supplement an earlier response, or to admit. If a party fails to provide information or identify a witness as required by §§18.50(c) and 18.53, or if a party fails to admit what is requested under §18.63(a) and the requesting party later proves a document to be genuine or the matter true, the party is not allowed to use that information or witness to supply evidence on a motion or at a hearing, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the judge, on motion and after giving an opportunity to be heard may impose other appropriate sanctions, including any of the orders listed in paragraph (b)(1) of this section.

(d) Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection—(1) In general—(i) Motion; grounds for sanctions.

The judge may, on motion, order sanctions if:

- (A) A party or a party's officer, director, or managing agent—or a person designated under §§18.64(b)(6) and 18.65(a)(4)—fails,

after being served with proper notice, to appear for that person's deposition; or

(B) A party, after being properly served with interrogatories under §18.60 or a request for inspection under §18.61, fails to serve its answers, objections, or written response.

(ii) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without the judge's action.

(2) Unacceptable excuse for failing to act. A failure described in paragraph

(d)(1)(i) of this section is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under §18.52(a).

(3) Types of sanctions. Sanctions may include any of the orders listed in paragraph (b)(1) of this section.

(e) Failure to provide electronically stored information. Absent exceptional circumstances, a judge may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) Procedure. A judge may impose sanctions under this section upon:

(1) A separately filed motion; or

(2) Notice from the judge followed by a reasonable opportunity to be heard.

## **TYPES OF DISCOVERY**

**§ 18.60 Interrogatories to parties.**

(a) In general—(1) Number. Unless otherwise stipulated or ordered by the judge, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with §18.51.

(2) Scope. An interrogatory may relate to any matter that may be inquired into under §18.51. An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the judge may order that the interrogatory need not be answered until designated discovery is complete, or until a prehearing conference or some other time.

(b) Answers and objections—(1) Responding party. The interrogatories must be answered:

(i) By the party to whom they are directed; or

(ii) If that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) Time to respond. The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under §18.54 or be ordered by the judge.

(3) Answering each interrogatory. Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) Objections. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the judge, for good cause, excuses the failure.

(5) Signature. The person who makes the answers must sign them, and the attorney or non-attorney representative who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the applicable rules of evidence.

(d) Option to produce business records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) Specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) Giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

**§ 18.61 Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.**

(a) In general. A party may serve on any other party a request within the scope of §18.51:

(1) To produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(i) Any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(ii) Any designated tangible things; or

(2) To permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure—(1) Contents of the request. The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected;

(ii) Must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(iii) May specify the form or forms in which electronically stored information is to be produced.



(2) Responses and objections—(i) Time to respond. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under §18.54 or be ordered by the judge.

(ii) Responding to each item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(iii) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

(iv) Responding to a request for production of electronically stored information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(v) Producing the documents or electronically stored information. Unless otherwise stipulated or ordered by the judge, these procedures apply to producing documents or electronically stored information:

(A) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(B) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(C) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in §18.56, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

**§ 18.62 Physical and mental examinations.**

(a) Examination by notice—(1) In general. A party may serve upon another party whose mental or physical condition is in controversy a notice to attend and submit to an examination by a suitably licensed or certified examiner.

(2) Contents of the notice. The notice must specify:

- (i) The legal basis for the examination;
- (ii) The time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it; and
- (iii) How the reasonable transportation expenses were calculated.

(3) Service of notice. Unless otherwise agreed by the parties, the notice must be served no fewer than 30 days before the examination date.

(4) Objection. The person to be examined must serve any objection to the notice no later than 14 days after the notice is served. The objection must be stated with particularity.

(b) Examination by motion. Upon objection by the person to be examined the requesting party may file a motion to compel a physical or mental examination. The motion must include the elements required by paragraph (a)(2) of this section.

(c) Examiner's report—(1) Delivery of the report. The party who initiated the examination must deliver a complete copy of the examination report to the party

examined no later than seven days after it receives the report, together with like reports of all earlier examinations of the same condition.

(2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

**§ 18.63 Requests for admission.**

(a) Scope and procedure—(1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of §18.51 relating to:

- (i) Facts, the application of law to fact, or opinions about either; and
- (ii) The genuineness of any described documents.

(2) Form; copy of a document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) Time to respond; effect of not responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under §18.54 or be ordered by the judge.

(4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith

requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) Objections. The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for hearing.

(6) Motion regarding the sufficiency of an answer or objection. The requesting party may move to determine the sufficiency of an answer or objection. Unless the judge finds an objection justified, the judge must order that an answer be served. On finding that an answer does not comply with this section, the judge may order either that the matter is admitted or that an amended answer be served. The judge may defer final decision until a prehearing conference or a specified time before the hearing.

(b) Effect of an admission; withdrawing or amending it. A matter admitted under this section is conclusively established unless the judge, on motion, permits the admission to be withdrawn or amended. The judge may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the judge is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this section is not an admission for any other purpose and cannot be used against the party in any other proceeding.

**§ 18.64 Depositions by oral examination.**

(a) When a deposition may be taken—(1) Without leave. A party may, by oral questions, depose any person, including a party, without leave of the judge except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under §18.56.

(2) With leave. A party must obtain leave of the judge, and the judge must grant leave to the extent consistent with §18.51(b):

(i) If the parties have not stipulated to the deposition and:

(A) The deposition would result in more than 10 depositions being taken under this section or §18.65 by one of the parties;

(B) The deponent has already been deposed in the case; or

(C) The party seeks to take the deposition before the time specified in §18.50(a), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(ii) If the deponent is confined in prison.

(b) Notice of the deposition; other formal requirements—(1) Notice in general. Except as stipulated or otherwise ordered by the judge, a party who wants to depose a person by oral questions must give reasonable written notice to every other party of no fewer than 14 days. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general

description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. If the notice to a party deponent is accompanied by a request for production under §18.61, the notice must comply with the requirements of §18.61(b).

(3) Method of recording—(i) Method stated in the notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the judge orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(ii) Additional method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the judge orders otherwise.

(4) By remote means. The parties may stipulate—or the judge may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this section, the deposition takes place where the deponent answers the questions.

(5) Deposition officer's duties—(i) Before the deposition. Unless the parties stipulate otherwise, a deposition must be conducted before a person having power

to administer oaths. The officer must begin the deposition with an on-the-record statement that includes:

- (A) The officer's name and business address;
- (B) The date, time, and place of the deposition;
- (C) The deponent's name;
- (D) The officer's administration of the oath or affirmation to the deponent;
- (E) The identity of all persons present; and
- (F) The date and method of service of the notice of deposition.

(ii) Conducting the deposition; avoiding distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in paragraphs (b)(5)(i)(A) and (B) of this section at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(iii) After the deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or subpoena directed to an organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or

designate other persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (b)(6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and cross-examination; record of the examination; objections; written questions—(1) Examination and cross-examination. The examination and cross-examination of a deponent proceed as they would at the hearing under the applicable rules of evidence. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under paragraph (b)(3)(i) of this section. The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination—whether to evidence, to a party’s conduct, to the officer’s qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the judge, or to present a motion under paragraph (d)(3) of this section.

(3) Participating through written questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party



noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; sanction; motion to terminate or limit—(1) Duration. Unless otherwise stipulated or ordered by the judge, a deposition is limited to 1 day of 7 hours. The judge must allow additional time consistent with §18.51(b) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction. The judge may impose an appropriate sanction, in accordance with §18.57, on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to terminate or limit—(i) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(ii) Order. The judge may order that the deposition be terminated or may limit its scope and manner as provided in §18.52. If terminated, the deposition may be resumed only by the judge's order.

(e) Review by the witness; changes—(1) Review; statement of changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(i) To review the transcript or recording; and

(ii) If there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes indicated in the officer's certificate. The officer must note in the certificate prescribed by paragraph (f)(1) of this section whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and delivery; exhibits; copies of the transcript or recording; filing—(1) Certification and delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the judge orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the party or the party's representative who arranged for the transcript or recording. The party or the party's representative must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and tangible things—(i) Originals and copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(A) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(B) Give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(ii) Order regarding the originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the proceeding.

(3) Copies of the transcript or recording. Unless otherwise stipulated or ordered by the judge, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to attend a deposition or serve a subpoena. A judge may order sanctions, in accordance with §18.57, if a party who, expecting a deposition to be taken, attends in person or by an attorney, and the noticing party failed to:

(1) Attend and proceed with the deposition; or

(2) Serve a subpoena on a nonparty deponent, who consequently did not attend.

**§ 18.65 Depositions by written questions.**

(a) When a deposition may be taken—(1) Without leave. A party may, by written questions, depose any person, including a party, without leave of the judge except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under §18.56.

(2) With leave. A party must obtain leave of the judge, and the judge must grant leave to the extent consistent with §18.51(b):

(i) If the parties have not stipulated to the deposition and:

(A) The deposition would result in more than 10 depositions being taken under this section or §18.64 by a party;

(B) The deponent has already been deposed in the case; or

(C) The party seeks to take a deposition before the time specified in §18.50(a); or

(ii) If the deponent is confined in prison.

(3) Service; required notice. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) Questions directed to an organization. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with §18.64(b)(6).

(5) Questions from other parties. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The judge may, for good cause, extend or shorten these times.

(b) Delivery to the deposition officer; officer's duties. Unless a different procedure is ordered by the judge, the party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in §18.64(c), (e), and (f) to:

- (1) Take the deponent's testimony in response to the questions;
- (2) Prepare and certify the deposition; and
- (3) Send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of completion or filing—(1) Completion. The party who noticed the deposition must notify all other parties when it is completed.

- (2) Filing. A party who files the deposition must promptly notify all other parties of the filing.

## **DISPOSITION WITHOUT HEARING**

### **§ 18.70 Motions for dispositive action.**

(a) In general. When consistent with statute, regulation or executive order, any party may move under §18.33 for disposition of the pending proceeding. If the judge determines at any time that subject matter jurisdiction is lacking, the judge must dismiss the matter.

(b) Motion to remand. A party may move to remand the matter to the referring agency.

A remand order must include any terms or conditions and should state the reason for the remand.

(c) Motion to dismiss. A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.

(d) Motion for decision on the record. When the parties agree that an evidentiary hearing is not needed, they may move for a decision based on stipulations of fact or a stipulated record.

**§ 18.71 Approval of settlement or consent findings.**

(a) Motion for approval of settlement agreement. When the applicable statute or regulation requires it, the parties must submit a settlement agreement for the judge's review and approval.

(b) Motion for consent findings and order. Parties may file a motion to accept and adopt consent findings. Any agreement that contains consent findings and an order that disposes of all or part of a matter must include:

- (1) A statement that the order has the same effect as one made after a full hearing;
- (2) A statement that the order is based on a record that consists of the paper that began the proceeding (such as a complaint, order of reference, or notice of administrative determination), as it may have been amended, and the agreement;
- (3) A waiver of any further procedural steps before the judge; and

(4) A waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

**§ 18.72 Summary decision.**

(a) Motion for summary decision or partial summary decision. A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.

(b) Time to file a motion. Unless the judge orders otherwise, a party may file a motion for summary decision at any time until 30 days before the date fixed for the formal hearing.

(c) Procedures—(1) Supporting factual positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (i) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection that a fact is not supported by admissible evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials not cited. The judge need consider only the cited materials, but the judge may consider other materials in the record.

(4) Affidavits or declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the judge may:

- (1) Defer considering the motion or deny it;
- (2) Allow time to obtain affidavits or declarations or to take discovery; or
- (3) Issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c) of this section, the judge may:

- (1) Give an opportunity to properly support or address the fact;
- (2) Consider the fact undisputed for purposes of the motion;
- (3) Grant summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
- (4) Issue any other appropriate order.



(f) Decision independent of the motion. After giving notice and a reasonable time to respond, the judge may:

- (1) Grant summary decision for a nonmovant;
- (2) Grant the motion on grounds not raised by a party; or
- (3) Consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the judge does not grant all the relief requested by the motion, the judge may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this section is submitted in bad faith or solely for delay, the judge—after notice and a reasonable time to respond—may order sanctions or other relief as authorized by law.

## **HEARING**

### **§ 18.80 Prehearing statement.**

(a) Time for filing. Unless the judge orders otherwise, at least 21 days before the hearing, each participating party must file a prehearing statement.

(b) Required conference. Before filing a prehearing statement, the party must confer with all other parties in good faith to:

- (1) Stipulate to the facts to the fullest extent possible; and
- (2) Revise exhibit lists, eliminate duplicative exhibits, prepare joint exhibits, and attempt to resolve any objections to exhibits.

(c) Contents. Unless ordered otherwise, the prehearing statement must state:

- (1) The party's name;
- (2) The issues of law to be determined with reference to the appropriate statute, regulation, or case law;
- (3) A precise statement of the relief sought;
- (4) The stipulated facts that require no proof;
- (5) The facts disputed by the parties;
- (6) A list of witnesses the party expects to call;
- (7) A list of the joint exhibits;
- (8) A list of the party's exhibits;
- (9) An estimate of the time required for the party to present its case-in-chief; and
- (10) Any additional information that may aid the parties' preparation for the hearing or the disposition of the proceeding, such as the need for specialized equipment at the hearing.

(d) Joint prehearing statement. The judge may require the parties to file a joint prehearing statement rather than individual prehearing statements.

(e) Signature. The prehearing statement must be in writing and signed. By signing, an attorney, representative, or party makes the certifications described in §18.50(d).

**§ 18.81 Formal hearing.**

(a) Public. Hearings are open to the public. But, when authorized by law and only to the minimum extent necessary, the judge may order a hearing or any part of a hearing closed to the public, including anticipated witnesses. The order closing all or part of the hearing

must state findings and explain why the reasons for closure outweigh the presumption of public access. The order and any objection must be part of the record.

(b) Taking testimony. Unless a closure order is issued under paragraph (a) of this section, the witnesses' testimony must be taken in an open hearing. For good cause and with appropriate safeguards, the judge may permit testimony in an open hearing by contemporaneous transmission from a different location.

(c) Party participation. For good cause and with appropriate safeguards, the judge may permit a party to participate in an open hearing by contemporaneous transmission from a different location.

**§ 18.82 Exhibits.**

(a) Identification. All exhibits offered in evidence must be marked with a designation identifying the party offering the exhibit and must be numbered and paginated as the judge orders.

(b) Electronic data. By order the judge may prescribe the format for the submission of data that is in electronic form.

(c) Exchange of exhibits. When written exhibits are offered in evidence, one copy must be furnished to the judge and to each of the parties at the hearing, unless copies were previously furnished with the list of proposed exhibits or the judge directs otherwise. If the judge does not fix a date for the exchange of exhibits, the parties must exchange copies of exhibits at the earliest practicable time before the hearing begins.

(d) Authenticity. The authenticity of a document identified in a pre-hearing exhibit list is admitted unless a party files a written objection to authenticity at least 7 days before the

hearing. The judge may permit a party to challenge a document's authenticity if the party establishes good cause for its failure to file a timely written objection.

(e) Substitution of copies for original exhibits. The judge may permit a party to withdraw original documents offered in evidence and substitute accurate copies of the originals.

(f) Designation of parts of documents. When only a portion of a document contains relevant matter, the offering party must exclude the irrelevant parts to the greatest extent practicable.

(g) Records in other proceedings. Portions of the record of other administrative proceedings, civil actions or criminal prosecutions may be received in evidence, when the offering party shows the copies are accurate.

### **§ 18.83 Stipulations.**

(a) The parties may stipulate to any facts in writing at any stage of the proceeding or orally on the record at a deposition or at a hearing. These stipulations bind the parties unless the judge disapproves them.

(b) Every stipulation that requests or requires a judge's action must be written and signed by all affected parties or their representatives. Any stipulation to extend time must state the reason for the date change.

(c) A proposed form of order may be submitted with the stipulation; it may consist of an endorsement on the stipulation of the words, "Pursuant to stipulation, it is so ordered," with spaces designated for the date and the signature of the judge.

### **§ 18.84 Official notice.**

On motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed.

**§ 18.85 Privileged, sensitive, or classified material.**

(a) Exclusion. On motion of any interested person or the judge's own, the judge may limit the introduction of material into the record or issue orders to protect against undue disclosure of privileged communications, or sensitive or classified matters. The judge may admit into the record a summary or extract that omits the privileged, sensitive or classified material.

(b) Sealing the record. (1) On motion of any interested person or the judge's own, the judge may order any material that is in the record to be sealed from public access. The motion must propose the fewest redactions possible that will protect the interest offered as the basis for the motion. A redacted copy or summary of any material sealed must be made part of the public record unless the necessary redactions would be so extensive that the public version would be meaningless, or making even a redacted version or summary available would defeat the reason the original is sealed.

(2) An order that seals material must state findings and explain why the reasons to seal adjudicatory records outweigh the presumption of public access. Sealed materials must be placed in a clearly marked, separate part of the record.

Notwithstanding the judge's order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.

**§ 18.86 Hearing room conduct.**

Participants must conduct themselves in an orderly manner. The consumption of food or beverage, and rearranging courtroom furniture are prohibited, unless specifically authorized by the judge. Electronic devices must be silenced and must not disrupt the proceedings. Parties, witnesses and spectators are prohibited from using video or audio recording devices to record hearings.

**§ 18.87 Standards of conduct.**

(a) In general. All persons appearing in proceedings must act with integrity and in an ethical manner.

(b) Exclusion for misconduct. During the course of a proceeding, the judge may exclude any person—including a party or a party’s attorney or non-attorney representative—for contumacious conduct such as refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly or ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The judge must state the basis for the exclusion.

(c) Review of representative’s exclusion. Any representative excluded from a proceeding may appeal to the Chief Judge for reinstatement within 7 days of the exclusion. The exclusion order is reviewed for abuse of discretion. The proceeding from which the representative was excluded will not be delayed or suspended pending review by the Chief Judge, except for a reasonable delay to enable the party to obtain another representative.

**§ 18.88 Transcript of proceedings.**

(a) Hearing transcript. All hearings must be recorded and transcribed. The parties and the public may obtain copies of the transcript from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter.

(b) Corrections to the transcript. A party may file a motion to correct the official transcript. Motions for correction must be filed within 14 days of the receipt of the transcript unless the judge permits additional time. The judge may grant the motion in whole or part if the corrections involve substantive errors. At any time before issuing a decision and upon notice to the parties, the judge may correct errors in the transcript.

#### **POST HEARING**

#### **§ 18.90 Closing the record; subsequent motions.**

(a) In general. The record of a hearing closes when the hearing concludes, unless the judge directs otherwise. If any party waives a hearing, the record closes on the date the judge sets for the filing of the parties' submissions.

(b) Motion to reopen the record. (1) A motion to reopen the record must be made promptly after the additional evidence is discovered. No additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed. Each new item must be designated as an exhibit under §18.82(a) and accompanied by proof that copies have been served on all parties.

(2) If the record is reopened, the other parties must have an opportunity to offer responsive evidence, and a new evidentiary hearing may be set.

(c) Motions after the decision. After the decision and order is issued, the judge retains jurisdiction to dispose of appropriate motions, such as a motion to award attorney's fees and expenses, a motion to correct the transcript, or a motion for reconsideration.

**§ 18.91 Post-hearing brief.**

The judge may grant a party time to file a post-hearing brief with proposed findings of fact, conclusions of law, and the specific relief sought. The brief must refer to all portions of the record and authorities relied upon in support of each assertion.

**§ 18.92 Decision and order.**

At the conclusion of the proceeding, the judge must issue a written decision and order.

**§ 18.93 Motion for reconsideration.**

A motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.

**§ 18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.**

(a) Relief pending review. If a timely motion is made for relief that the judge lacks authority to grant because a petition for review has been docketed and is pending, the judge may:

- (1) Defer considering the motion;
- (2) Deny the motion; or
- (3) State either that the judge would grant the motion if the reviewing body remands for that purpose or that the motion raises a substantial issue.



(b) Notice to reviewing body. The movant must promptly notify the clerk of the reviewing body if the judge states that he or she would grant the motion or that the motion raises a substantial issue.

(c) Remand. The judge may decide the motion if the reviewing body remands for that purpose.

**§ 18.95 Review of decision.**

The statute or regulation that conferred hearing jurisdiction provides the procedure for review of a judge's decision. If the statute or regulation does not provide a procedure, the judge's decision becomes the Secretary's final administrative decision.

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